(17,963.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 478

DANIEL H. TALBOT, PLAINTIFF IN ERROR,

vs.

THE SIOUX NATIONAL BANK OF SIOUX CITY, IOWA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

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a Plea before the supreme court of Iowa in a cause therein tried and determined, wherein Daniel H. Talbot was plaintiff and appellant and Sioux National Bank of Sioux City, Iowa, defendant and appellee.

Be it remembered that on the 3rd day of April, 1899, there was filed in the supreme court of Iowa a printed abstract of record, duly served as required by law, the same being in the words and figures following, to wit:

1 In the Supreme Court of the State of Iowa, January Term, 1899.

DANIEL H. TALBOT, Appellant,
vs.
SIOUX NATIONAL BANK OF SIOUX CITY, IOWA, Appellee. } At Law.

Appeal from Woodbury district court—Hon. Geo. W. Wakefield, trial judge.

D. H. Talbot, for appellant.
J. S. Lothrop, attorney for appellee.

APPELLANT'S ABSTRACT OF RECORD.

Bill of Exceptions.

Be it remembered that at the May term, 1898, of said court, and on the 13th day of May, 1898, this came on for ruling upon the motion of the defendant to strike from the third count of the amended petition which was filed, as shown by the appearance docket, July 17, 1897, in words and figures as follows:

(*Motion to Strike from Amended Petition and to Make More Specific. Filed July* 17, 1897.)

Now comes the above-named defendant and moves the
2 court to strike from count three of plaintiff's amended petition filed herein May 20th, 1897, as follows:

1st. To strike from said count all after the word "herein" in line eight of said count, down to and including the word "and" in line thirteen thereof; also to strike out the word "further" in said line thirteen, because said matter is irrelevant and redundant; asks for judgment when the petition shows no cause of action; asks for impossible judgment and fails to comply with the former order of this court to make his petition more specific.

2nd. To strike from said count all commencing with the word "plaintiff" in line fifteen down to and including the word "bank" in line nineteen thereof, because therein asking for an order to examine books, etc., and no statement showing the necessity for such order; said matter being irrelevant and redundant; also that said

matter shows the books, etc., asked for to be in the control of a person not a party to this action and over whom this court has no jurisdiction.

Motion to Make More Specific.

Defendant also moves the court to require plaintiff to make his count three of said amended petition, to wit: so much thereof as is not included in the motion to strike, more specific in this, to wit:

1st. Let him state the date when the said sum of $173.11 or the last item thereof, claimed in said count three, was deposited in said defendant bank.

2d. Let him state when, if ever, he drew a check for the sum balance of any moneys deposited by him in said bank of which payment by the bank was refused. Let him give dates and the sum named in such check or checks, and the date when the same was presented and discharged.

LOTHROP & PYNE,
Attorneys for Defendant Bank.

3 And also for a ruling upon a motion for rehearing of this cause, on the demurrer, filed by the plaintiff, as shown by the appearance docket, April 19, 1898, in words and figures following:

Motion for a Rehearing.

"Comes now the plaintiff in the above-entitled action and moves the court to order a rehearing of said cause on the demurrer filed by the defendant herein, and for grounds thereof states:

"1st. That since the argument was had on said demurrer and since the decision of the court on said demurrer, the Supreme Court of the United States in the case of Brown *vs.* Marion National Bank of Lebanon, Ky., has decided substantially the same questions raised by the said demurrer in this cause and that said decision is favorable to the plaintiff herein.

"2nd. Because the importance of a correct decision by this court upon the demurrer filed by the defendant herein requires and demands a further and more thorough examination of the authorities and law applicable to the issues raised by said demurrer in order that justice may be meted out to the parties to this action and extra costs and expenses avoided.

"ARGO & MIDDLEKAUF,
"*Att'ys for Plaintiff.*"

And the issues in this case being therein joined, the court ordered the following record to be made, and which record is to be found on page 395 of the District Court Record No. 35 of Woodbury county, Iowa, in words and figures as follows:

And now, to wit: May 13, 1898, this cause comes on for ruling upon the motion of the defendant to strike from the third count of the amended petition herein and to make the same more specific the same having been heretofore submitted and taken under ad-

visement by the court, the Hon. F. R. Gaynor, presiding
4 judge; and the court having duly considered the said motion and being fully advised in the premises sustains the same as to first ground of said motion to strike, and overrules the same as to second ground thereof; and as to the grounds of said motion asking that said amended petition be made more specific, the court sustains the same. This said ruling is made upon the motion as herein stated, filed July 17, 1897; and to said ruling both parties hereto except—and upon the motion for rehearing of this cause filed by plaintiff April 19, 1898, and duly submitted to the court, Hon. F. R. Gaynor, presiding judge, the court being advised, finds against the plaintiff and overrules the same; to which ruling the plaintiff excepts.

And with the consent and at the request of the plaintiff, the court, as a part of the same order and recorded in the same entry on page 395 of the District Court Record No. 35, added thereto and made a part thereof, the following sentence, constructed by words as follows:

"And therefore, the plaintiff by his attorneys, Argo & Middlekauf, elects to stand on the record in this cause as now made and not to plead over, whereupon the said plaintiff is given ninety days to file bill of exceptions."

And in view of the foregoing position taken by parties in interest and the court, the clerk will here copy in full the original notice issued from the office of the sheriff of Woodbury county, Iowa, on the 29th day of August, 1896, and the certificate of personal service made by the same officer on James F. Toy, president of the Sioux national bank, which, as shown by the appearance docket of Woodbury county, Iowa, was made and filed on August 29, 1896:

Original Notice.

"In the District Court of the State of Iowa in and for Woodbury County, October Term, A. D. 1896.

"D. H. TALBOT, Plaintiff,
vs.
THE SIOUX NATIONAL BANK OF SIOUX CITY, IOWA, and JAS. F. Toy, President, Defendant.

5 "To the Sioux National Bank of Sioux City, Iowa, and Jas. F. Toy, president:

"You are hereby notified that on or about the 7th day of October, A. D. 1896, the petition of plaintiff in the above-entitled cause will be filed in the office of the clerk of the district court of the State of Iowa, in and for Woodbury county, claiming of you the sum of sixteen thousand dollars, money as justly due from you, and interest thereon at eight per cent. from the 7th day of October, A. D. 1896, as money justly due and owing to plaintiff for unlawful, excessive and usurious interest charged against plaintiff and taken from him by said Sioux national bank during the years 1889, 1890, 1891, 1892,

1893, 1894, 1895 and 1896. Plaintiff will also ask an accounting of all moneys paid to said bank by him and all moneys received by him from said bank, under sections 5197 and 5198 of the Revised Statutes of the United States relating to national banks.

"And that unless you appear thereto and defend before noon of the second day of the next term, being the October term of the said court, which will commence at Sioux City, Iowa, on the 19th day of October, 1896, default will be entered against you and judgment and decree rendered against you as provided by law.

"Dated 29th day of August, A. D. 1896.

"GEORGE W. ARGO,
"*Attorney for Plaintiff.*

"STATE OF IOWA, }
Woodbury County, } ss:

"Received the within notice the 29th day of August, 1896, and I hereby certify that I served the same on James F. Toy, August 29, 1896, at Sioux City, Woodbury county, Iowa, by reading the same to James F. Toy, or by offering to read the original to him, which he waived, and delivering to him a true copy thereof on the 29th day of August, 1896, in Sioux City township, Woodbury county, Iowa.

"W. C. DAVENPORT,
"*Sheriff of Woodbury Co.,*
"By JOHN A. DAVENPORT, *Deputy.*

6 "Fees: Service, 75c.; copies, 50c.; mileage, 20c.; total, $1.45. Paid by plaintiff August 29, 1896.

"W. C. DAVENPORT, *Sheriff.*

"STATE OF IOWA, }
Woodbury County, } ss:

"I hereby certify that the within notice came into my hands for service on the 29th day of August, 1896, and that I personally served the same on the defendant by reading the same to James F. Toy, president of the Sioux national bank, or by offering to read the same to him, which he waived, and delivering to him a true copy thereof on the 29th day of August, 1896, in Sioux City township, Woodbury county, Iowa.

"W. C. DAVENPORT, *Sheriff,*
"By JOHN A. DAVENPORT, *Deputy.*"

Clerk will here copy the original petition, which is shown by the appearance docket was filed October 7, 1896, in full, in words and figures as follows:

Petition.

"The plaintiff states that the defendant, The Sioux National Bank, is a corporation duly organized and existing under and by virtue of the banking laws of the United States, and as such is capacitated to sue and to be sued, and that the defendant, James F. Toy, is president of said defendant bank.

"The plaintiff claims of the defendants and each of them the sum of $16,000, as money justly due plaintiff from defendants, on account of unlawful and usurious interest, knowingly and unlawfully taken from the plaintiff within the seven years last past.

"The plaintiff further alleges that during said time he had various and numerous business transactions with the defendant bank; in all said transactions defendant charged and exacted a greater rate of interest for the use of moneys had and received
7 by plaintiff from the defendants than the law recognizes or permits a national bank to charge for the use of money.

"Plaintiff further states that the books and accounts wherein said transactions have been kept and entered of record are in the possession of the defendant, and that plaintiff has no itemized statements of the account between him and the defendants.

"That at the present time the books, checks and vouchers and accounts and other evidence of the dealings and business had between plaintiff and defendant are in the hands of one Jonathan Brown, who claims to be the receiver of said defendant bank, and that said Brown, as receiver, and having possession of said books and accounts, declines and refuses to allow plaintiff to examine said books and accounts between plaintiff and defendants, and refuses to furnish plaintiff with a copy of said account or an itemized statement showing the different items and full account between the parties of this action.

"And, therefore, the plaintiff is unable to attach to his petition an exhibit showing the full account between him and defendants, and is also for the same reason unable to incorporate in this petition such statement or bill of particulars.

"The plaintiff further states that there is now a balance due him from defendants of about $250, which sum was deposited with the defendant subject to check, but has never been drawn out or paid over to the plaintiff.

"Plaintiff further states that this action is commenced under and by virtue of sections 5197 and 5198 of the Revised Statutes of the United States relating to national banks.

"Plaintiff further states that there is now justly due and owing to him from the defendants the full sum of $16,000, no part of which has been paid.

"Wherefore plaintiff demands judgment against the de-
8 fendants and each of them for the full sum of $16,250, together with interest and costs of this action, and also prays this honorable court to make an order that plaintiff may have the opportunity to inspect and examine the books and accounts wherein are entered and kept the dealings and business transactions between plaintiff and defendant, and take a certified copy of said account in order that same may be used upon trial of said case and as an exhibit to plaintiff's petition.

"GEO. W. ARGO,
"*Attorney for Plaintiff.*"

Clerk will here copy in full defendant bank's demurrer to petition, filed as shown by the appearance docket October 23, 1896, by

its attorneys, Lothrop & Pyne (who appeared as attorneys of record October 20, 1896), in words and figures as follows:

Demurrer to Petition.

"The defendant, The Sioux National Bank, comes and demurs to plaintiff's petition and for cause shows that the matters and things therein stated, as there stated and set forth, are sufficient in law to entitle plaintiff to recover, and for further causes of demurrer said defendant shows to the court:

"1st. That there is a misjoin-er of parties defendant to said action.

"2nd. That there is a misjoin-er of causes of action set out in said petition.

"3rd. That there is no allegation of any contract or agreement between plaintiff and said defendant for the payment of the alleged usurious interest.

"4th. That no copy of certificate of deposit or other evidence of indebtedness of such bank to plaintiff on account of deposit therein is attached to the petition.

"5th. That it appears from said petition that the alleged
9 claim for usurious interest is barred by the statute of limitations.

"6th. That it appears from said petition that the defendant bank is now and was at the commencement of this action in the custody and control of the United States by its receiver appointed thereto under and by virtue of the laws of the United States, and this court has no jurisdiction to consent that an action be brought against said receiver, and no suit or action at law can be brought against said bank affecting the revenues or assets thereof while in process of liquidation by a receiver.

"7th. That this court has no jurisdiction to order the receiver to grant to plaintiff an inspection of the books of the bank.

"8th. That this action is improperly brought against the defendant bank, the petition showing that its assets, property and effects were at the time of commencing the same in the hands, possession and control of the United States by its receiver, duly appointed thereto under the laws of the United States.

"9th. That in effect the action is against the receiver, and this court is without jurisdiction to entertain or consider the same."

Clerk will here copy in full the order of court permitting the defendant to withdraw its demurrer and file motion in this cause, as shown by the entry in the District Court Record No. 33, page 117, in words and figures as follows:

"And now, at this time, this cause coming on for hearing and the parties appearing by their respective attorneys, it is the order of court that the defendant Sioux National Bank have leave to withdraw its demurrer and file motion in this cause."

Clerk will here copy in full the demurrer of James F. Toy,
10 by his attorney, M. J. Sweeley (who appeared as attorney of record October 20, 1896), and which said demurrer is shown

by the appearance docket as having been filed October 23, 1896, in words and figures as follows:

"Comes now James F. Toy, president, the defendant above named, and demurs to the plaintiff's petition on the ground that the facts stated in said petition do not entitle the plaintiff to the relief demanded in this:

"1st. That it is not shown in said petition that this defendant had any part in the transactions referred to by the plaintiff, or that he charged or exacted any illegal or usurious interest in any deals, contracts or transactions had with the plaintiff.

"2nd. That under the facts set up in plaintiff's petition this defendant is not in any manner liable to the plaintiff for or on account of any sum of money owed plaintiff by the defendant bank growing out of interest paid or money deposited."

Clerk will here copy in full motion to elect to divide and make more specific by defendant Sioux National Bank, and which as shown by the appearance docket was filed November 4th, 1896, in words and figures as follows:

"Now comes the above-named defendant, The Sioux National Bank, and moves the court to require the plaintiff to divide his petition into counts so that the alleged claims for the recovery for and on account of usurious interest shall be separated from the alleged claim for money deposited with said defendant bank, so as to enable said defendant to plead or answer to said different claims separately.

"Said defendant also moves the court to rule the plaintiff to make his petition more specific, in this, to wit:

"1st. Let him state the day or dates when the alleged usurious interest was taken by defendant as alleged in said petition.

11 "2nd. Let him state what sum of alleged usurious interest, if any, was paid to said defendant by plaintiff within two years prior to commencing this action and give the date or dates of such payments and the sum paid at such date or dates.

"3rd. Let him state the contract or agreement made by plaintiff for the payment of the alleged usurious interest, the date or dates of such contract or contracts, and the name of the party, officer of said defendant, with whom made.

"4th. Let him state the rate of the alleged usurious interest paid by him to defendant within two years prior to commencing this action.

"5th. Let him state the date or dates when he deposited money with defendant as alleged in petition that has not been drawn out or paid over to plaintiff.

"6th. Let him state whether he has ever presented a check for the alleged balance of money due him for deposits in defendant bank subject to check, and give the date of presenting such check.

"7th. Let him attach as an exhibit to his petition a copy of his account against said defendant for his alleged balance of deposit therein.

"And the said defendant further moves the court to rule the plaintiff to elect on which cause of action, to wit: to recover for the

alleged taking of usurious interest or to recover for the alleged balance of deposits, he will then proceed, and to dismiss as to the other, also to elect as to which defendant, the bank or James F. Toy, he will proceed against and dismiss as to the others, for the reason that said actions and parties are improperly joined herein, there being no law for the recovery against an individual of the statutory penalty for taking usurious interest claimed in this action."

And upon December 31, 1896, the court, in ruling upon the demurrer of James F. Toy, and on the motion of the de-
12 fendant Sioux National Bank to elect to divide and make more specific, ruled in words and figures as follows (which is to be found recorded in the District Court Record No. 33, p. 191):

"And now, to wit: December 31, 1896, this cause coming on for ruling upon the demurrer of the defendant James F. Toy, and the motion of the defendant Sioux National Bank, the court finds, after due consideration of the same and the arguments of counsel being fully advised, that said demurrer should be sustained and the said motion sustained in part. And the parties having appeared in court by their respective attorneys, it is thereupon ordered that the demurrer of defendant James F. Toy be and the same hereby is sustained, and to this finding and order the plaintiff excepts. And it is further ordered that the motion of the defendant Sioux National Bank to divide the petition of plaintiff and make the same more specific be and the same is hereby sustained so far as to require the plaintiff to state his cause of action for usury in one count, and also to state his cause of action for a deposit in a separate count, and also to state the amount claimed as usury that was paid within two years next prior to the commencement of this cause of action, and otherwise said motion is overruled; to all of which each party excepts."

Clerk will here copy in full amendment to petition, May term, 1897, which is divided into count first, count second, and count three, and the Exhibits "A" and "B" thereto attached and made a part thereof in counts one and two.

Exhibit "A" being a copy of a real estate mortgage note made by plaintiff D. H. Talbot to "A. S. Garretson or bearer, '(in)' the principal sum of twenty-eight thousand dollars, with interest thereon at the rate of eight per cent. per year from March, 1890, until maturity, payable semi-annually, according to the tenor of ten interest notes each for eleven hundred twenty dollars bearing even date
13 herewith, both principal and interest notes payable at Sioux national bank with exchange." And as more fully described by the making an exact copy thereof of the entire Exhibit "A" with the several indorsements thereon made by A. S. Garretson on the principal note and the ten interest-coupon notes respectively.

Exhibit "B," made a part thereof in like manner as Exhibit "A," is an "indenture of mortgage made and entered into this first day of March, A. D. 1890, by and between D. H. Talbot, unmarried, of the county of Woodbury and State of Iowa, party of the first part,

and A. S. Garretson, of the county of Woodbury and State of Iowa, party of the second part," in the sum of twenty-eight thousand dollars and interest secured by this said mortgage upon certain thereindescribed lands lying and being in the county of Plymouth and State of Iowa, representing a total of 3,290.57 acres, and as more specifically described in the instrument itself, which was acknowledged before C. L. Joy, notary public in and for Woodbury county, Iowa, the first day of March, 1890, and filed for record in the Plymouth county book of records the 5th day of March, 1890, at 8 o'clock, a. m., and as shown by the appearance docket of Woodbury county, Iowa, the hereinbefore-described amendment to petition and the Exhibits "A" and "B" as therein stated and here specially referred to was, as therein recorded, filed the 20th day of May, 1897. The said amendment to petition, with its Exhibits "A" and "B" above described as copied in full, is in words and figures as follows:

"In the District Court in and for Woodbury County, Iowa, May Term, 1897.

"D. H. TALBOT, Plaintiff,
vs.
SIOUX NATIONAL BANK OF SIOUX CITY, IOWA, Defendant.

"*Amendment to Petition.*

"Comes now the plaintiff in the above-entitled action, and by leave of the court amends his petition as follows:

"*Count First.*

"Paragraph 1st. That on or about the 27th day of May, 14 1889, the plaintiff herein commenced doing business with the defendant bank by borrowing money of said bank, depositing money in said bank, drawing checks for the payment of money on said bank in the customary and ordinary way of transacting business between banks and customers and patrons thereof. And that plaintiff continued doing business with defendant bank as aforesaid until said bank failed or closed its doors, on or about the 27th day of August, 1896.

"Par. 2. That during the time plaintiff was doing business with the defendant bank as aforesaid, the said defendant bank, without the knowledge or consent of plaintiff, did knowingly and unlawfully reserve and charge a greater rate of interest on the money borrowed and received by plaintiff from said bank than that allowed by the laws of the State of Iowa. That the amount of said unlawful interest reserved and charged by said bank amounts to more than one dollar, but the exact amount thereof plaintiff cannot at this time state or set forth, neither can he set forth or state the dates, at which the several items of said unlawful interest *was* by the defendant bank reserved and charged, because the books, accounts, records and papers in which the accounts and business transactions between

plaintiff and said bank were made and recorded are in the custody, possession and control of the defendant bank, its officers and representatives, to which plaintiff has not now and never has had access or the privilege of examining.

" Par. 3. That on or about the 24th day of February, 1890, the defendant bank did add to the amount of plaintiff's legitimate indebtedness the several sums and items of unlawful and usurious interest, reserved and charged by it against the plaintiff herein, together with a further sum of two thousand dollars to be advanced to plaintiff in the future, the total amount of which was ten thousand dollars, which sum defendant wrote in a promissory
15 note due on the 30th day of June, 1890, drawing interest at the rate of ten per cent. from date, and a further sum as attorney's fees, which note, when prepared by the defendant as aforesaid, plaintiff signed and delivered to defendant bank, and was a renewal of past and prior indebtedness of plaintiff, and included, continued and contained all of the illegal and usurious interest charged prior thereto by defendant against the plaintiff.

" Par. 4th. That as collateral to and security for the payment of the ten-thousand-dollars note aforesaid, plaintiff assigned to defendant bank all of his equity in eighty-one railroad land contracts covering three thousand two hundred and ninety and $\frac{57}{100}$ acres of land in Plymouth county, Iowa, which railroad land contracts were delivered to the defendant along with and as a part of the same transaction of the making of the aforesaid note.

" Par. 5th. That afterwards, to wit: on or about the 4th day of March, 1890, the plaintiff herein executed and delivered to the defendant bank a certain non-negotiable promissory note for twenty-eight thousand dollars, which note was given to cover all of plaintiff's indebtedness to defendant bank, to wit: fourteen thousand five hundred dollars, in a draft, to pay on certain railroad lands; the ten-thousand-dollar note herein mentioned before, and the unlawful and usurious interest knowingly reserved and charged prior thereto, and continued in said ten-thousand-dollar note aforesaid and continued and renewed in the twenty-eight-thousand-dollar note; that by reason of the unlawful and usurious interest being continued and included in the said twenty-eight-thousand-dollar note, the same being tainted, was and is an unlawful and usurious note. (A copy of said note is hereto annexed, marked Exhibit 'A,' and made a part hereof.)

" Par. 6th. That to secure the payment on the twenty-
16 eight-thousand-dollar note, the plaintiff, on said 4th day of March, 1890, executed and delivered to the defendant herein a certain mortgage on three thousand two hundred and ninety and $\frac{57}{100}$ acres of land in Plymouth county, Iowa. (A copy of said mortgage is hereto attached, marked Exhibit 'B,' and made a part hereof.) That said mortgage was duly filed for record on the 5th day of March, 1890, in the office of the recorder of deeds and mortgages in and for Plymouth county, Iowa, and on same day recorded in Book 6, on page 382, of mortgage records.

" Par. 7th. That the above note and mortgage which were made

upon the 4th day of March, 1890, did include the $10,000 illegal and unearned note, and interest to the amount of $17.10; and which said note and mortgage were made to date back and to bear date of March 1, 1890, thereby increasing the rate of interest on the $10,000 note to about 14 per cent. per annum; and which said illegal, unlawful and usurious interest was knowingly reserved and charged by the defendant and included in and is a part of the $28,000 note aforesaid.

"Par. 8th. That the said defendant bank knowingly and unlawfully reserved and charged plaintiff with unlawful and usurious interest, amounting to more than $1, prior to the making of said ten-thousand-dollar note aforesaid, and that said unlawful and usurious interest so reserved and charged as aforesaid was put into and was included in said $10,000 note, which fact caused a forfeiture of all of the interest due or to become due from plaintiff to defendant in said transaction, as provided in sections 5197 and 5198 of the Revised Statutes of the United States, which are as follows:

"'SEC. 5197. Any association may take, receive, reserve and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at the rate allowed by the laws
17 of the State, Territory or district where the bank is located, and no more, except that where by the laws of any State a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this title. When no rate is fixed by the laws of the State, Territory, or district, the bank may take, receive, reserve or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days from which the note, bill or other evidence of debt has to run. And the purchase, discount or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase, discount or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.'

"'Penalty for taking usurious interest.—SEC. 5198. The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back in action, in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred.'

"Par. 9th. That the unlawful and usurious interest knowingly reserved and charged by said defendant bank against the plaintiff herein, together with the interest which in law and in fact was and is forfeited but was unlawfully and wrongfully put in a pretended judgment against plaintiff herein in a certain case entitled
18 J. W. White *vs.* D. H. Talbot *et al.*, in the district court of Plymouth county, Iowa, and the forfeited interest which has

since *incurred* amounts in all to about nine thousand dollars; the exact amount plaintiff cannot state for the reason the accounts, books, papers and records of said business between plaintiff and defendant bank, is in the custody and possession of said defendant and to which plaintiff has no access; and which amount of nine thousand dollars is due and owing to the plaintiff from the defendant.

Count Second.

"The plaintiff, as and for a second count of and to his amendment to his original petition filed herein, states:

"Par. 1st. That on or about the 27th day of May, 1889, plaintiff commenced doing business with defendant bank, who was then and is now a national bank, created, organized and existing under and by virtue of the laws of the United States, and as such national bank was then and is now subjected to and controlled by the laws of the United States and State of Iowa. That after the plaintiff commenced business with defendant bank, and before the 24th day of February, 1890, defendant knowingly had reserved from and charged plaintiff with usurious and unlawful interest, amounting to more than one dollar, which unlawful and usurious interest the defendant knowingly and unlawfully and without plaintiff's knowledge or consent, included in a ten-thousand-dollar note signed by plaintiff on said 24th day of February, 1890, payable June 30th, 1890, and bearing interest at the rate of ten per cent. per annum, and the customary attorney's fees for defendant's attorney.

"Par. 2. That on or about the 4th day of March, 1890, the defendant bank furnished plaintiff a further sum of money which it then added to the unlawful and usurious interest prior thereto reserved from and charged to the plaintiff without his knowl-
19 edge or consent, and as evidence thereof put said usurious and unlawful interest, reserved and charged as aforesaid, together with the further sum then and there furnished plaintiff into a non-negotiable promissory note for twenty-eight thousand dollars, due March 1st, 1895, but wrongfully and without consent of plaintiff dated said note on March 1st, 1890, instead of March 4th, 1890, the actual and true date thereof. That the reserving and charging of said unlawful and usurious interest, and including the same in said note, worked a forfeiture of all of the interest in said note and the business transaction between plaintiff and defendant. That the unlawful and forfeited interest represented in said twenty-eight-thousand-dollar note was $13,125.40, and that said note should have been only for $14,874.60, as governed by sections 5197 and 5198 of the Revised Statutes of the United States, which sections are set forth in paragraph 8 of the first count of this amendment, and by reference is made a part thereof.

"Par. 3. That to secure the payment of the said $28,000 note aforesaid, on said 4th day of March, 1890, the plaintiff herein executed and delivered to the defendant bank a certain real-estate mortgage, which mortgage was wrongfully and without the direction or the consent of the plaintiff dated March 1st, 1890, instead of

March 4th, 1890, the true date thereof. (A copy of said mortgage is hereto attached to this amendment, marked Exhibit 'B,' and made a part hereof.) That said mortgage was filed for record on the 5th day of March, 1890, in the office of the recorder of deeds and mortgages in and for Plymouth county, Iowa, and on the same day recorded in Book 6, on page 382, of mortgage records.

"Par. 4. That, as plaintiff is informed and believes, the defendant bank in some manner wrongfully and unlawfully, unknown to the plaintiff, and without his knowledge or consent, delivered
20 said mortgage and note to one J. W. White, a stockholder in and of the defendant bank, who afterwards, unlawfully and before said note was due and payable, commenced a foreclosure proceedings in the district court of Plymouth county, Iowa.

"Par. 5. Plaintiff further states that upon May 4th, 1890, at the time of making the $28,000 note and mortgage aforesaid, Wm. L. Joy, the senior member of the firm of attorneys, Joy, Hudson, Call & Joy, was president of the present defendant bank; that the said A. S. Garretson, the payee of said note and mortgage, was the cashier thereof, and that the said J. W. White was a very large holder of stock in said Sioux national bank; and, further, that these respective parties in interest did conspire with a view to the bringing about a foreclosure and by this means adjudicate the liabilities which they would bear under the provisions of section 5329, Revised Statutes, because of the knowingly reserving and charging of unlawful and illegal interest as heretofore set out in this amended petition. And that said interested parties, as officers or agents of the said bank, unlawfully and with the intent to impose upon the court, by fraudulent representations to the honorable judge of the district court in Plymouth county, Iowa, set out in their petition for said foreclosure the right and justice of foreclosure upon the sole ground of nonpayment of interest, which interest they, individually and collectively, had full knowledge of having been reserved and charged and of which the defendant in said proceedings was without knowledge at that time, and the said interest was forfeited under the provisions of section 5197 and 5198 of Revised Statutes.

"Par. 6. That the said J. W. White, in pursuance of the conspiracy formed with the said A. S. Garretson and W. L. Joy as aforesaid, and for the purpose of misleading and deceiving said district court and causing it to assume jurisdiction in said case,
21 wrongfully and unlawfully, suppressed the fact that said twenty-eight-thousand-dollar note contained unlawful and usurious interest, and that all of the interest in said note and the indebtedness of the plaintiff to defendant and said Garretson had been forfeited, and suppressed the fact that said note had lost its interest-bearing power and was not due, and that no right of action then existed, and suppressed the fact that the court had no jurisdiction to try or hear said cause or render judgment therein.

"Par. 7. The plaintiff further states that on or about the 9th day of April, 1891, the said J. W. White, A. S. Garretson, W. L. Joy, and the firm of Joy, Hudson, Call & Joy, and the defendant bank, did wrongfully and unlawfully combine, conspire and confederate to-

gether to and did cause an action to be commenced and proceedings to be instituted against the plaintiff herein, and the land described in said Exhibit "B," in the district court of Plymouth county, Iowa, in the name of said J. W. White, instead of the name of the defendant herein, The Sioux National Bank, the real party in interest. That said action was so commenced in the name of said J. W. White for the purpose of avoiding and evading the force and effect of the sections of the Revised Statutes of the United States here-before set forth and referred to in this amendment.

"Par. 8. That afterwards, to wit: on or about the 6th day of May, 1891, judgment was rendered in said district court in and for Plymouth county, Iowa, against the plaintiff herein, for thirty-one thousand and eighty-six dollars and fifty cents, including therein attorneys' fees, and the unlawful and usurious interest, and the forfeited interest hereinbefore mentioned and referred to, and also the foreclosure of the lands described in the mortgage, a copy of which is hereto attached and marked Exhibit "B," and that said lands were afterwards sold on special execution to satisfy said judgment
22 and all bid in and purchased by C. L. Joy, a director of defendant bank and also a member of the firm of Joy, Hudson, Call & Joy, for said plaintiff J. W. White, except one tract of forty acres which was sold to one E. A. Smith and D. A. Williams, one forty acres to Bartholomew Poredek, one forty acres to Christ Munch, and one forty acres to Christian Larson; and that afterwards deeds were issued to the respective purchasers of said land by the sheriff of Plymouth county, Iowa, and that said sheriff's deeds have since been duly recorded in the office of the recorder of deeds of Plymouth county, Iowa, in the manner required by law.

"Par. 9. That the court, in rendering its judgment, relied on the statements of counsel for plaintiff, and the allegations of the petition, and believing the same to be true, and not knowing that said petition and claim of plaintiff included the usurious, unlawful and forfeited interest hereinbefore set forth and mentioned, and not being advised or knowing that all of the interest on said note had been forfeited, was deceived and misled by the said fraud practiced upon it by the defendant herein, the said J. W. White, plaintiff in said cause of action, and the attorneys representing said plaintiff, and was thereby induced to and did render its judgment for the sum of $13,125.40 more than would be actually due at maturity of said note and mortgage, to wit: March 1st, 1895.

"Par. 10. The plaintiff further states, that the district court in and for Plymouth county, did not have jurisdiction over the plaintiff herein or the property described in Exhibit "B" hereto attached, at the term said court rendered the judgment aforesaid, because all of the interest on said $28,000 note had been forfeited and its interest-bearing power killed and destroyed by reason of the facts hereinbefore stated. And the unlawful, usurious and forfeited interest which had been reserved and charged against the plaintiff herein and included in said note, therefore the said note was
23 in fact not due. And said judgment, decree of foreclosure,

the issuance of the execution on said judgment, and the making of the sheriff's deed aforesaid, were and are illegal and void.

"Par. 11. That the said J. W. White and the defendant herein unlawfully, wrongfully, and without the knowledge or consent of the plaintiff, forcibly, on or about the 31st day of May, 1894, took possession of the lands and property described in aforesaid Exhibit "B," and has forcibly held possession ever since, causing the plaintiff herein to suffer and sustain damages by being deprived of the use and occupation and benefits of said premises and the reserving and charging of the unlawful and usurious interest heretofore mentioned in the approximate sum of $31,000.

"*Count Three.*

"Comes now the plaintiff, and by the way of third count of plaintiff's amendment to his original petition filed herein states:

"Par. 1. That there is a balance due and owing to plaintiff for money deposited in said bank, the sum of $173.11, which has never been drawn or checked out of said bank, and that the same is now the property of the plaintiff herein.

"Wherefore, plaintiff demands judgment against The Sioux National Bank, defendant herein, on the first count of this amendment in the sum of nine thousand dollars and interest from May 31st, 1893. And on the second count plaintiff demands judgment in the sum of $13,125.40, and an additional sum of $13,125.40 as a penalty provided for by sections 5197 and 5198, Revised Statutes of the United States, together with the interest thereon; and for the further sum of $173.11 on the third count of the amendment.

"Plaintiff also prays the court to make an order permitting the plaintiff or any one else representing him to examine and
24 take extracts and copies therefrom of the books, accounts and papers under the control of one Jonathan W. Brown, who has since the commencement of this suit been appointed receiver of said bank, and for costs in this case."

(Duly verified.)

EXHIBIT "A"

Real-estate Mortgage Note.

On or before the 1st day of March, 1895, for value received, I promise to pay A. S. Garretson, or bearer, the principal sum of twenty-eight thousand dollars, with interest thereon at the rate of eight per cent. per year, from March first, 1890, until maturity, payable semi-annually, according to the tenor of ten interest notes, each for eleven hundred twenty dollars, bearing even date herewith, both principal and interest notes payable at Sioux national bank with exchange.

And if default be made in the payment of any of said notes so secured or any part of them, as the same matures, for the space of thirty days, or if the maker of this note and interest notes attached hereto, shall allow the taxes or any other public rates or assessments

on the property or any part hereof, given as security for the aforesaid notes, to become delinquent, or shall do any act whereby the value of said mortgaged property shall be impaired, then upon the happening of any such contingencies, the whole amount herein secured shall at once be and become due and payable, and the mortgagee, his legal representatives or assigns, may proceed at once to collect this note and foreclose the mortgage given to secure said note and sell the mortgaged property or so much thereof as shall be necessary to satisfy said debt, interest and costs, and all taxes, rates or public assessments that may be due thereon, together with a reasonable attorney fee, if suit be commenced for the purpose of collecting this debt, or foreclosing the mortgage securing said debt, and also said taxes, public rates, assessments and costs incurred by the mortgagee, his representatives or assigns, shall be secured by mortgage and also included in judgment in such foreclosure case. It is expressly agreed and declared that these notes are made and executed under and are in all respects to be construed by the laws of the State of Iowa, and are secured by mortgage of even date herewith duly recorded in Plymouth county, of the State of Iowa.

This note bears interest at the rate of eight per cent. per year, payable half yearly after maturity.

Dated at Sioux City, Iowa, on the first day of March, 1890.

(Signed) D. H. TALBOT.

Endorsement: Protest waived. A. S. Garretson.

$1,120.00. SIOUX CITY, IOWA, *March 1st*, 1890.

On the first day of March, 1895, for value received, I promise to pay to the order of A. S. Garretson, eleven hundred twenty dollars, at Sioux national bank, with exchange on New York, being the interest on my principal note of $28,000.00 of even date herewith. This note bears interest at eight per cent. per year after due.

D. H. TALBOT.

(Endorsement:) A. S. Garretson.

$1,120.00. SIOUX CITY, IOWA, *March 1st*, 1890.

On the first day of March, 1894, for value received, I promise to pay to the order of A. S. Garretson, eleven hundred twenty dollars, at Sioux national bank, with exchange on New York, being the interest due on my principal note of $28,000.00 of even date herewith. This note bears interest at eight per cent. per year after due.

D. H. TALBOT.

(Endorsement:) A. S. Garretson.

$1,120.00. SIOUX CITY, IOWA, *March 1st*, 1890.

On the first day of March, 1893, for value received, I promise to pay to the order of A. S. Garretson, eleven hundred twenty dollars, at Sioux national bank, with exchange on New York, being the in-

terest due on my principal note of $28,000.00 of even date herewith. This note bears interest at eight per cent. per year after due.

D. H. TALBOT.

(Endorsement:) A. S. Garretson.

26 $1,120.00. SIOUX CITY, IOWA, *March 1st*, 1890.

On the first day of March, 1892, for value received, I promise to pay to the order of A. S. Garretson, eleven hundred twenty dollars, at Sioux national bank, with exchange on New York, being the interest on my principal note of $28,000.00 of even date herewith. This note bears interest at the rate of eight per cent. per year after due.

D. H. TALBOT.

(Endorsement:) A. S. Garretson.

$1,120.00. SIOUX CITY, IOWA, *March 1st*, 1890.

On the first day of March, 1891, for value received, I promise to pay to the order of A. S. Garretson, eleven hundred twenty dollars, at Sioux national bank, with exchange on New York, being the interest on my principal note of $28,000.00 of even date herewith. This note bears interest at eight per cent. per year after due.

D. H. TALBOT.

(Endorsement:) A. S. Garretson.

$1,120.00. SIOUX CITY, IOWA, *March 1st*, 1890.

On the first day of Sept., 1894, for value received, I promise to pay to the order of A. S. Garretson, eleven hundred twenty dollars, at Sioux national bank, with exchange on New York, being the interest due on my principal note of $28,000.00 of even date herewith. This note bears interest at eight per cent. per year after due.

D. H. TALBOT.

(Endorsement:) A. S. Garretson.

$1,120.00. SIOUX CITY, IOWA, *March 1st*, 1890.

On the first day of Sept., 1893, for value received, I promise to pay to the order of A. S. Garretson, eleven hundred twenty dollars, at Sioux national bank, with exchange on New York, being the interest due on my principal note of $28,000.00 of even date herewith. This note bears interest at eight per cent. per year after due.

D. H. TALBOT.

(Endorsement:) A. S. Garretson.

$1,120.00. SIOUX CITY, IOWA, *March 1st*, 1890.

27 On the first day of Sept., 1892, for value received, I promise to pay to the order of A. S. Garretson, eleven hundred twenty dollars, at Sioux national bank, with exchange on New York, being the interest due on my principal note of $28,000.00 of even date herewith. This note bears interest at eight per cent. per year after due.

D. H. TALBOT.

(Endorsement:) A. S. Garretson.

$1,120.00. SIOUX CITY, IOWA, *March 1st*, 1890.

On the first day of Sept., 1891, for value received, I promise to *pay to the order of A. S. Garretson*, eleven hundred twenty dollars, at Sioux national bank, with exchange on New York, being the interest due on my principal note of $28,000.00 of even date herewith. This note bears interest at eight per cent. per year after due.

D. H. TALBOT.

(Endorsement:) A. S. Garretson.

$1,120.00. SIOUX CITY, IOWA, *March 1st*, 1890.

On the first day of Sept., 1890, for value received, I promise to pay to the order of A. S. Garretson, eleven hundred twenty dollars, at Sioux national bank, with exchange on New York, being the interest due on my principal note of $28,000.00 of even date herewith. This note bears interest at eight per cent. per year after due.

D. H. TALBOT.

(Endorsement:) A. S. Garretson.

EXHIBIT "B."

"This indenture of mortgage, made and entered into this first day of March, 1890, by and between D. H. Talbot, unmarried, of the county of Woodbury and State of Iowa, party of the first part, and A. S. Garretson, of the county of Woodbury and State of Iowa, party of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of one dollar, and of the indebtedness hereinafter mentioned, has given, granted, bargained, sold and conveyed, and by these presents does give, grant, bargain, sell and convey unto said party of the second part, his heirs and
28 assigns forever, the following-described pieces or parcels of land lying and being in the county of Plymouth and State of Iowa, to wit:

"The east one-half, the southwest qr. and the south half of the northwest qr. of sec. No. five (5), the west half of sec. No. seventeen (17), the west half of northwest qr., northeast quarter of the northwest qr. and west half of southwest qr. of sec. No. nineteen (19), all in township No. ninety (90) north, of range No. forty-seven (47), west of the 5th P. M., Iowa.

"All of sec. No. one (1), the southeast qr. and the south half of northeast qr. of sec. No. three (3), the southeast qr., north half of northeast qr. and southwest qr. of the northeast qr. of sec. No. thirteen (13). the northwest qr. of northeast quarter of southeast qr. and south half of southeast qr. of sec. No. fifteen (15), all in tp. No. ninety (90) north, of range No. forty-eight (48), west of the 5th P. M., Iowa. The south half and the northwest qr. of sec. No. thirty-one (31), in tp. No. ninety-one (91), north, of range No. forty-seven (47), west of the 5th P. M., Iowa. The south half and south half of southwest qr. of northeast qr. of sec. No. thirty-five (35), in tp. No. ninety-one (91), north, of range No. forty-eight (48), west of the 5th P. M., Iowa. Containing in all three thousand two hundred ninety and fifty-seven-hundredths (3,290.57) acres of land, more or less.

"With all the appurtenances and improvements thereto belonging. To have and to hold the same to the party of the second part, his heirs and assigns forever, hereby covenanting that the said party of the first part, at the time of the delivery of these presents, is well seized of the premises above described, of perfect, absolute and indefeasible state of inheritance in the law, in fee-simple, and that the same are free and clear of all incumbrance whatever, and that he will ever warrant and defend the same to the party of the second part, his heirs and assigns, against all claims whatsoever.

29 "And the said party of the first part hereby relinquishes all his right of homestead in and to the above-described premises.

"This grant is intended as security for the payment of one certain promissory coupon note for $28,000.00 bearing date March first, 1900, executed by D. H. Talbot, the said party of the first part, to the party of the second part, and drawing interest at the rate of eight per cent. per annum, until paid, for the sum of twenty-eight thousand dollars, interest payable semi-annually, on the first day of March and September of each year, as per coupon interest notes attached, payable at Sioux national bank, and is intended to be secured by this mortgage, and the said party of the first part hereby agrees to pay all taxes that have been or may be assessed upon said premises, and in case it shall become necessary for a party of the second part, his heirs or assigns, to pay the taxes or insurance of the aforesaid property, the party of the first part hereby agrees to refund to the party of the second part, his heirs or assigns, all sums so expended, with interest at the rate of eight per cent. per annum, and this mortgage shall be security for all sums so expended.

"Now, therefore, if the said party of the first part shall well and truly pay or cause to be paid the said promissory note, including the principal and interest thereon, as aforesaid, at the time promptly as aforesaid, that this indenture shall be null and void, else of full force and virtue.

"If the said party of the first part shall fail to pay any portion of the above-mentioned sums, either principal or interest, promptly at the times they shall become due, respectively, as aforesaid, or shall neglect to pay all taxes assessed or to be assessed on said property, before the same shall become delinquent, or shall neglect to keep the buildings on said property insured as herein specified, then the whole sum, both principal and interest, shall at once become

30 due and collectible, and in that case said party of the second part, either by himself or agent, shall have the right to enter upon and take possession of said premises and sell the same in the manner now, or that may hereafter be, provided by law, and out of the proceeds of such sale, first paying the expenses thereof, including two hundred dollars as attorney's fees and all expenses whatsoever that may accrue by reason of such sale, then deducting therefrom the amount of said debt and interest and all the aforesaid taxes and insurance, with interest thereon at the rate aforesaid, rendering unto said party of the first part the surplus if any. And it is ex-

pressly understood and agreed that said second party may become the purchaser at said sale if he so choose.

"And in case of foreclosure of this mortgage or the commencement of foreclosure, the said party of the first part, his heirs, representatives and assigns, covenant and agree that he will pay to said party of the second part, his representatives or assigns, in addition to the taxable costs and expenses in the foreclosure suit, the said sum of two hundred dollars as attorney's fees.

"In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

"D. H. TALBOT. [SEAL.]

"STATE OF IOWA, } ss:
County of Woodbury, }

"Be it remembered, that on the first day of March, in the year one thousand eight hundred and ninety, before me, C. L. Joy, a notary public within and for said county and State, personally appeared D. H. Talbot, unmarried, to me personally known to me to be the person who is described in and who executed the within and foregoing instrument, and he duly acknowledged to me that he executed the same, freely and voluntarily.

"In witness whereof, I have hereunto set my hand and official seal, at said county, the day and year above written.

"[SEAL.] C. L. JOY,
"*Notary Public.*

31 "Filed for record the 5th day of March, A. D. 1890, at 8 o'clock, a. m.

"WALLACE WINSLOW, *Recorder.*

"STATE OF IOWA, } ss:
Plymouth County, }

"I, G. W. McLain, recorder of Plymouth county, Iowa, do hereby certify that the foregoing is a true and complete copy of the records found in Book 6, page 382, of mortgage records of Plymouth county, Iowa, and has been duly compared.

"Dated Lemars, Iowa, Jan. 2, 1897.

"G. W. McLAIN, *Recorder.*
"LIZZIE B. BURKE, *Deputy.*"

And to which defendant bank demurred to the first and second counts of plaintiff's said amended petition, in words and figures as follows:

"Now comes the defendant to the above-entitled cause and demurs to the first count of plaintiff's amended petition filed herein May 20th, 1897, and to each and every paragraph thereof and hereof shown to the court as causes for demurrer:

"1st. That said petition is filed in an action in law, and said count is improperly divided into paragraphs.

"2nd. That said count of said petition purports to be for the recovery of unlawful interest alleged to have been taken by defend-

ant, and it appears from said count that plaintiff has paid defendant no interest.

"3rd. That it does not appear from said count of said petition what the action is brought for.

"4th. That said count contains no demand or claim for any sum against defendant.

"5th. That said count purports to be for the recovery under the provisions of sections 5197 and 5198, Revised Statutes of the United States, and does not state a cause coming within the provisions of said statutes.

"6th. That plaintiff, in said count, has failed to comply
32 with the former order of the court in this case to make his petition more specific.

"7th. The matters and things set out in said count and the several paragraphs thereof do not constitute in law a right of action against defendant, nor entitle plaintiff to recover.

"8th. That the matters set out in said petition are principally conclusions and not facts.

"And defendant demurs to the second count of plaintiff's said amended petition and to each and every paragraph thereof for and upon all the grounds heretofore stated as causes for demurrer to the first count thereof, and further:

"1st. That said action is barred by the limitations prescribed in section 5198, Revised Statutes of the United States, under which said action purports to be brought.

"2nd. That the note and mortgage made part of the petition contradicts the statement in petition that the same were executed to defendant and shows that defendant was not a party to the alleged usurious transaction."

And which demurrer to first and second counts of plaintiff's amended petition was ruled upon by the court, as shown by the District Court Record No. 35, on page 185, in words and figures as follows:

"And now, to wit: January 4, 1898, it being the 48th day of the regular October, 1897, term of this court, this cause comes on for hearing upon the demurrer of the defendant, The Sioux National Bank, to plaintiff's petition, the said defendant appearing by its attorney, J. S. Lothrop, and the plaintiff appearing by his attorney, G. W. Argo; and the said demurrer being fully submitted, the court finds, being advised, that the demurrer should be sustained. It is therefore ordered and adjudged that the defendant's demurrer be and the same is hereby sustained, to which ruling the plaintiff excepts and is given fifteen days in which to amend."

33 And following said order, as it is shown by the record in the District Court Record No. 35, on page 195, it was ordered by the court in words and figures as follows:

"And now, at this time, this cause coming on in its order, and the parties appearing by counsel, it is ordered by the court that the plaintiff have until February 11, 1898, to amend his petition."

And upon the 8th day of February, 1898, the court made an order in words and figures as follows:

"And now, at this time, February 8th, 1898, this cause being called and the parties appearing by their respective attorneys and consenting thereto, the plaintiff is given until April 15, 1898, to file amendment to his petition."

And the above being all the pleadings, all the evidence, all the motions, all the demurrers, and all the objections and exceptions thereto and rulings thereon, and being a full and complete record of all the proceedings had upon the trial of said cause, plaintiff asks the court to sign this his bill of exceptions, and make the same a part of the record in said cause, which is done accordingly.

Dated this 4th day of August, 1898.

F. R. GAYNOR, *Judge.*

And following the filing of foregoing bill of exceptions August 5, 1898, a motion was filed August 26, 1898, by defendant, in words and figures as follows:

"Now comes the above-named defendant and moves the court for a rule upon the plaintiff, D. H. Talbot, to amend count three of his petition filed herein by making the same more specific, as directed by the order of this court heretofore entered in said cause, and that such amendment be made within five days from the service of notice hereof."

Upon which the court ruled September 17, 1898, at the August term, in words and figures as follows:

34 "Now at this time, to wit: September 17, 1898, this cause being called for further hearing, the plaintiff appears by his attorneys Geo. W. Argo and W. J. Sweeley, and defendant appears by its attorney J. S. Lothrop, and thereupon, on motion of defendant, it is ordered that the plaintiff amend the third count of his amended petition by making the same more specific, as required by a former order of this court, on or before September 27, 1898."

And following, on September 29, 1898, at the August term, the decree of the court was in words and figures as follows, as shown by the District Court Record of Woodbury County No. 35, on page 492:

"Now, at this time, to wit: September 29, 1898, this cause being called in its order, the defendant appears by its attorney, J. S. Lothrop, and the plaintiff having heretofore elected to stand upon his amended petition and the record made by the rulings of the court upon demurrer, motion for rehearing and the motion to make the third count of plaintiff's amended petition more specific; and having failed to further plead, so standing on the amended petition and record; it is now ordered by the court, that the petition as amended and the cause of action be and they are hereby dismissed, at the costs of the plaintiff. It is further ordered and adjudged that the defendant have and recover of and from the plaintiff the costs of this action, taxed at $—, and that execution issue therefor. And to this ruling and judgment of the court the plaintiff excepts."

Notice of appeal from such decree and judgment of the court was served in words and figures as follows:

In the District Court of the State of Iowa in and for Woodbury County.

D. H. TALBOT, Plaintiff,
vs.
SIOUX NATIONAL BANK OF SIOUX CITY, IOWA, Defendant.

35 *Notice of Appeal.*

To the above-named Sioux National Bank and its attorney, J. S. Lothrop, and W. S. Belden, clerk of said court:

You are hereby notified that the plaintiff, D. H. Talbot, in said action has appealed from his election made May 13, 1898, and recorded in the District Court Record No. 35, on page 395, to stand on the record theretofore made and not to plead further, upon his amended petition and the rulings made by the court on defendant's demurrer, motion for rehearing and the motion to make the third count of his petition more specific; and from the judgment of the district court of the State of Iowa, in and for Woodbury county, rendered in favor of the defendant at the August, 1898, term thereof, on the 29th day of September, 1898, to the supreme court of Iowa; and that said appeal will come on for hearing and trial in said court at the January, 1899, term to be held at Des Moines, Iowa, commencing on the third Tuesday, being the 17th day of January, 1899.

D. H. TALBOT.

Dated October 12, 1898.

STATE OF IOWA, *Woodbury County,* } ss:

The undersigned, to whom the within notice is directed, hereby acknowledges due, complete and legal service of the within notice upon each of us, on this 12th day of October, A. D. 1898, in said county.

J. S. LOTHROP,
Attorney for Sioux National Bank.
W. S. BELDEN,
Clerk of District Court in and for Woodbury Co.

And subsequently filed in the office of the clerk of the district court of Woodbury county, the 12th day of October, 1898.

The foregoing abstract contains all the pleadings of both plaintiff and defendant submitted to the court in said cause and the
36 rulings of the court thereon, and the exceptions taken thereto by both plaintiff and defendant; which pleadings, rulings and exceptions were by said bill of exceptions duly signed by the trial judge and filed in the office of the judge and the clerk of the district court of Woodbury county, Iowa, and within the prescribed time made a part of the record in this cause; and that subsequent thereto defendant, on August 26, 1898, filed a motion for further hearing, and the ruling thereon by the court bearing date of Sep-

tember 17, 1898, and the final judgment of the court bearing date of September 29, 1898, and plaintiff's exceptions thereto, and proper notice of appeal and the filing thereof with the clerk of the district court of Woodbury county, Iowa, each and all of these respective additions to the pleadings in this cause are also herein copied and made a part of this record.

Assignment of Errors.

The appellant assigns errors as follows:

1. The court erred in sustaining defendant's motion to elect to divide and make more specific (Abstract, pp. 10 and 11), in the following words: "And it is further ordered that the motion of defendant, Sioux National Bank, to divide the petition of plaintiff and make the same more specific be and the same is hereby sustained so far as to require the plaintiff to state his cause of action for usury in one count and also to state his cause of action for a deposit in a separate count, and also to state the amount claimed as usury that was paid within two years next prior to the commencement of this cause of action, and otherwise said motion is overruled; to all of which each party excepts" (Abstract, p. 12). And for the reason as stated in plaintiff's petition (Abstract, pp. 6, 7 and 8), of which the following is a part: "That at the present time the books, checks, vouchers and accounts, and other evidences of the dealings and business had between plaintiff and defendant are in the hands of one
37 Jonathan W. Brown, who claims to be the receiver of said defendant bank, and that said Brown, as receiver, and having possession of said books and accounts, declines and refuses to allow plaintiff to examine said books and accounts between plaintiff and defendants, and refuses to furnish plaintiff with a copy of said account or an itemized statement showing the different items and full accounts between the parties of this action. And, therefore, the plaintiff is unable to attach to his petition an exhibit showing the full account between him and defendants, and is also for the same reason unable to incorporate in this petition such statement or bill of particulars" (Abstract, p. 7). * * * "And also prays this honorable court to make an order that plaintiff may have the opportunity to inspect and examine the books and accounts wherein are entered and kept the dealings and business transactions between plaintiff and defendant and take a certified copy of said account in order that same may be used upon trial of said case and as an exhibit to plaintiff's petition" (Abstract, p. 8). And further, that the court made an impossible demand because, when all said books, papers and accounts were kept entirely away from the knowledge of plaintiff, the exact facts could not, nor can they now, be learned and given by plaintiff into the hands of the court.

2. The court erred in sustaining defendant's demurrer (Abstract, pp. 31, 32) to the first and second counts of amendment to petition (Abstract, pp. 13 to 31) without at the same time and in like manner ruling on the motion to strike from amended petition and to make more specific" (Abstract, pp. 1 and 2), and for the like reasons as

set out in plaintiff's petition (Abstract, pp. 6, 7 and 8), and specifically copied in assignment of error number 1 preceding, and also as stated in paragraph 2 of count one of amendment to petition (Abstract, p. 14), and in paragraph 1, count two, of amendment to petition (Abstract, p. 18), wherein it is fully shown that the greater rate of interest than allowed by the laws of the State of Iowa was charged or otherwise taken without the knowledge or consent of plaintiff, and that the several items of said unlawful interest could not be learned owing to the books, accounts, records and papers showing such unlawful charging of interest, plaintiff had no access to nor privilege of examining, and that a full accounting should have been ordered that plaintiff might thereby demand full relief.

38

3. The court erred in sustaining the first cause of defendant's demurrer to plaintiff's count one of his amended petition, which is as follows: "That said petition is filed in an action at law, and such count is improperly divided into paragraphs" (Abstract, pp. 31, 32). And for the following reasons: That there is no prohibition by statute against pleading in the manner objected to; nor in any sense is it detrimental in presenting the subject-matter before the court.

4. The court erred in sustaining the second cause of defendant's demurrer to plaintiff's count one of his amended petition, which is as follows: "That said count of said petition purports to be for the recovery of unlawful interest alleged to have been taken by defendant, and it appears from said count that plaintiff has paid no interest" (Abstract, pp. 31, 32), and for the reasons: That under sections 5197 and 5198, Revised Statutes, where the charge of the greater rate of interest is made than is allowed by the laws of Iowa, it is not necessary, for the purpose of showing a forfeiture of the entire interest which the account, note, bond or other evidence of debt would otherwise bear, to plead that the greater rate had been paid.

5. The court erred in sustaining the third cause of defendant's demurrer to plaintiff's count one of his amended petition, which is as follows: "That it does not appear from said count of said petition what the action is brought for" (Abstract, pp. 31, 32), and for the reasons: That it is clearly shown by paragraph 2 of amended petition (Abstract, p. 14), and the remaining paragraphs or sections of said amended petition that it was and is for the forfeited interest and penalty incurred by defendant in violation of sections 5197 and 5198, Revised Statutes.

39

6. The court erred in sustaining the fourth cause of defendant's demurrer to plaintiff's count one of his amended petition, which is as follows: "That said count contains no demand or claim for any sum against defendant" (Abstract, pp. 31, 32), and for the reasons, as stated in said count one (Abstract, p. 18): "The exact amount plaintiff cannot state for the reason the accounts, books, papers and records of said business between plaintiff and defendant bank is in the custody and possession of said defendant and to which plaintiff has no access;" and for the further reason that judgment on this count is asked for in the prayer (Abstract, p. 23).

7. The court erred in sustaining the fifth cause of defendant's demurrer to plaintiff's count one of his amended petition, which is as follows: "That said count purports to be for the recovery under the provisions of sections 5197 and 5198 Revised Statutes of the United States, and does not state a cause coming within the provisions of said statutes" (Abstract, pp. 31, 32), and for the reasons: That it is fully shown by paragraph 2 (Abstract, p. 14) and remaining paragraphs or sections of said count that the greater rate of interest than was allowed by the laws of Iowa was charged into the account and from said account entered into notes and bonds, as against the provisions of said sections 5197 and 5198, Revised Statutes, without plaintiff's knowledge or consent.

40 8. The court erred in sustaining the sixth cause of defendant's demurrer to plaintiff's count one of his amended petition, which is as follows: "That plaintiff, in said count, has failed to comply with the former order of the court in this case to make his petition more specific" (Abstract, pp. 31, 32), and for the reasons: That defendant charged plaintiff the greater rate without his knowledge (par. 2, Abstract, p. 14), and regardless of its legal notice and of the pleadings praying for an opportunity to learn the facts, additional to this specific knowledge, and thus called to the court's attention, the court did not see proper to grant the request as just and lawful.

9. The court erred in sustaining the seventh cause of defendant's demurrer to plaintiff's count one of his amended petition, which is as follows: "The matters and things set out in said count and the several paragraphs thereof do not constitute in law a right of action against defendant, nor entitle plaintiff to recover" (Abstract, pp. 31, 32), and for the reasons: That the entire proceedings connected with said count and the paragraphs thereof deny and nullify the statement made in this cause of demurrer.

10. The court erred in sustaining the eighth cause of defendant's demurrer to plaintiff's count one of his amended petition, which is as follows: "That the matters set out in said petition are principally conclusions and not facts" (Abstract, 31, 32), and for the reason: That the proper remedy upon this statement of the contents or allegations of said count was by motion and not by demurrer.

11. The court erred in sustaining the first cause of defendant's demurrer to plaintiff's count two of his amended petition, which is as follows: "That said petition is filed in an action at law, and such count is improperly divided into paragraphs" (Abstract, pp. 31, 32), and for the following reasons: That there is no prohibition by

41 statute against pleading in the manner objected to; nor in any sense is it detrimental in presenting the subject-matter before the court.

12. The court erred in sustaining the second cause of defendant's demurrer to plaintiff's count two of his amended petition, which is as follows: "That said count of said petition purports to be for the recovery of unlawful interest alleged to have been taken by defendant, and it appears from said count that plaintiff has paid defendant no interest" (Abstract, pp. 31, 32), and for the reasons: That it is

clearly shown by said count the manner in which the usurious or "greater rate" of interest was charged into the accounts, notes and bonds of plaintiff against his knowledge; that the payee of the bonds and coupons after endorsement was cashier of defendant, and that at the option of defendant it elected to sell said mortgage, that the property thus held as security was sold; that said petition further states that the damages incurred by plaintiff "by being deprived of the use and occupation and benefits of said premises and the reserving and charging of the unlawful and usurious interest heretofore mentioned in the approximate sum of $31,000," and in the prayer, judgment is asked in the sum of $13,125.40 (as the forfeited interest) and an additional sum of $13,125.40 as a penalty, provided for by sections 5197 and 5198, Revised Statutes of the United States * * * (Abstract, p. 23), and which is by operation of law a statement of the amount paid.

13. The court erred in sustaining the third cause of defendant's demurrer to plaintiff's count two of his amended petition, which is as follows: "That it does not appear from said count of said petition what the action is brought for" (Abstract, pp. 31, 32), and for the reasons: It is clearly shown by paragraph 1 (Abstract, p. 18) and the subsequent paragraphs in said count (Abstract, pp. 18 to 31), and the prayer of said count (Abstract, p. 23), that a complete
42 pleading has been made to comply with the provisions of sections 5197 and 5198, Revised Statutes.

14. The court erred in sustaining the fourth cause of defendant's demurrer to plaintiff's count two of his amended petition, which is as follows: "That said count contains no demand or claim for any sum against defendant" (Abstract, pp. 31, 32), and for the reasons: That in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 (Abstract, pp. 18–23), is a statement of a cause of action, and in paragraph 11 and in the prayer (Abstract, p. 23) is defined the claim of $26,250.80 and interest.

15. The court erred in sustaining the fifth cause of defendant's demurrer to plaintiff's count two of his amended petition, which is as follows: "That said count purports to be for the recovery under the provisions of sections 5197 and 5198, Revised Statutes of the United States, and does not state a cause coming within the provisions of said statutes" (Abstract, pp. 31, 32), and for the reasons: That it is fully shown by paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and the prayer thereto (Abstract, pp. 18–23), that the foregoing cause of demurrer is incorrect in that it is charged and no evidence offered to deny the allegation that one dollar and other sums unknown to plaintiff were charged into the account and into notes and subsequently into bonds for which defendant received the benefit, and which was placed in judgment without plaintiff having any such knowledge of the charging of such unlawful interest, and finally by depriving plaintiff of his property without notice to him of such unlawful charge, and by operation of law such greater rate or usurious interest was not paid until plaintiff with knowledge of such unlawful charge by defendant brought this action.

16. The court erred in sustaining the sixth cause of defend-
43 ant's demurrer to plaintiff's count two of his amended petition, which is as follows: "That plaintiff, in said count, has failed to comply with the former order of the court in this case to make his petition more specific" (Abstract, pp. 31, 32), and for the reasons: That defendant charged plaintiff the greater rate without his knowledge (par. 1, Abstract, p. 18), and regardless of the court's duty to take judicial notice and the pleadings praying for an opportunity to discover the facts, additional to this specific knowledge, and thus called to the court's attention, the court's order could not the more definitely be complied with, and by such act of the court deprived plaintiff of the full relief to which he is entitled.

17. The court erred in sustaining the seventh cause of defendant's demurrer to plaintiff's count two of his amended petition, which is as follows: "The matters and things set out in said count and the several paragraphs thereof do not constitute in law a right of action against defendant, nor entitle plaintiff to recover" (Abs., pp. 31, 32), and for the reasons: That the entire proceedings which are made a statement of facts, as far as known in said count, and the paragraphs and sections thereof (Abs., pp. 18–23), deny and nullify the statement made in this cause of demurrer.

18. The court erred in sustaining the eighth cause of defendant's demurrer to plaintiff's count two of his amended petition, which is as follows: "That the matters set out in said petition are principally conclusions and not facts" (Abs., pp. 31, 32), and for the reason that the proper remedy upon this statement of the contents of said count was by motion and not by demurrer.

And following the duplicating of like causes of demurrer as heretofore excepted to, to counts one and two respectively, plaintiff continues his grounds for demurrer in the two following numbers (Abstract, p. 32):

19. The court erred in sustaining the first ground of de-
44 fendant's demurrer to plaintiff's count two of his amended petition, which is as follows: "That said action is barred by the limitations prescribed in section 5198, Revised Statutes of the United States, under which said action purports to be brought," and for the reasons: That the charge into the account between plaintiff and defendant of the greater rate than was allowed by the laws of Iowa was made without knowledge of plaintiff; it so entered into the subsequently given notes and bonds; defendant elected to dispose of said bonds, including the charge therein of the illegal interest, attorney's fees and other illegal charges, and the purchaser elected to and did ask the cancellation of the entire debt and thus foreclosed solely on account of default in payment of the illegal interest; the court had no jurisdiction to order a foreclosure until the principal or legal debt represented by the bonds were due; the court had judicial knowledge of this injury to plaintiff and when the present action was brought before it, by operation of law, judicial notice should have been exercised under the provisions of section 5198, Revised Statutes, and judgment rendered for double the entire amount of interest contracted to be paid by plaintiff and such other

amounts as might have been found by ordering a general accounting and which was included in such contracts or bonds.

20. The court erred in sustaining the second ground of defendant's demurrer to plaintiff's count two of his amended petition, which is as follows: "That the note and mortgage made part of the petition contradicts the statement in petition that the same were executed to defendant, and shows that defendant was not a party to the alleged usurious transaction," and for the reasons: That A. S. Garretson was cashier of defendant and liable under the national banking law, for losses incurred under sections 5197 and 5198, Revised
45 Statutes, to defendant; that the charge of the greater rate than was allowed by the laws of Iowa was made into the account between plaintiff and defendant prior to March 1, 1890, the date of the making of the bond (Abs., p. 18, par. 1st, and p. 24, Exhibit "A"); the making of the bond to "A. S. Garretson or bearer" did not purge the illegal interest included therein; it did not pass from the defendant until endorsed by the legal holder; by including the illegal interest in the bond or mortgage (Abs., p. 27, Exhibit "B") rendered the coupon notes in the name of A. S. Garretson void and without consideration, and in consequence the entire proceedings in foreclosure were void; the statute of limitations did not begin to run until plaintiff knowingly paid the illegal interest as such.

21. The court erred in sustaining ground first of defendant's motion to strike from amended petition and to make more specific (Abstract, pp. 1, 2 and 4), and for the reasons: Plaintiff moves to strike from said count all after the word "herein," which is as follows: "On the first count of this amendment in the sum of nine thousand dollars and interest from May 31st, 1893, and on the second count plaintiff demands judgment in the sum of $13,125.40, and an additional sum of $13,125.40 as a penalty provided for by sections 5197 and 5198, Revised Statutes of the United States, together with the interest thereon; and" * * * also the word "further" preceding the word sum in the last line, so that this prayer shall read: "Wherefore plaintiff demands judgment against The Sioux National Bank, defendant herein, for the sum of $173.11, on the third count of the amendment" (Abs., p. 23). And it further erred for the reason that the court had judicial knowledge of the forfeiture of the entire interest and was vested with the power to declare judgment, and the claim made in the prayer should not have been ruled out by motion.

22. The court erred in overruling the second ground of
46 the motion to strike from amended petition and to make more specific (Abstract, pp. 1, 2 and 4), and for the reasons: That this portion of the pleadings was not a part of count three, but instead was a part of the general prayer (Abs., p. 23) to the petition, and should not have been considered as a whole in connection with the entire petition, as applicable to the provisions of sections 5197 and 5198, Revised Statutes.

23. The court erred in sustaining the grounds of said motion asking that said amended petition be made more specific (Abstract

p. 2, pars. 1 and 2, and Abstract, p. 4), for the reasons: That the demands made by defendant were not specific, and in so far that under sections 5197 and 5198, Revised Statutes, once the greater rate was charged into the account or other evidence of debt, the entire petition must be included as one demand until it shall be determined to what extent the taint of forfeiture existed.

24. The court erred in sustaining defendant's motion to elect to divide and make more specific paragraphs first, second, third, fourth, fifth, sixth and seventh, for the reasons: That it was not specific or consistent; that it also erred in sustaining plaintiff's demurrer to first count (Abstract, 31) for want of consistency and not being specific. And to the second count (Abstract, pp. 31, 32) for the reason that the grounds are not clearly stated nor numbered, and are wanting in consistency and not being specific; and to motion to strike from amended petition and to make more specific (Abstract, pp. 1 and 2), for the reason that it is not specific and the rulings thereon are not consistent with the pleadings and the imposed judicial notice on the court.

25. That the court erred in overruling the motion of plaintiff for a rehearing upon the grounds stated by reference to the recent decision of the Supreme Court of the United States in the case of Brown *vs.* Marion National Bank of Lebanon, Ky., 169 U. S., 47 416 (Abstract, pp. 3 and 4); and the trial court further erred in not recognizing that judicial construction of a statute by the superior court must be followed, and that all acts of the inferior court on questions inconsistent with such constructions are void.

26. The court erred in sustaining the motion of defendant for a rule upon plaintiff that he should amend count three (Abstract, pp. 33, 34) after plaintiff had elected "to stand on the record in this cause as now made and not plead over" following the rulings of the court on defendant's motion "to strike from the third count of the amended petition and to make more specific," and upon the motion of plaintiff for a rehearing (Abstract, pp. 3, 4) for the reasons: That under the pleadings and resting of plaintiff, the motion of the defendant was a waiver of all rulings of the court proceedings in defendant's behalf and that the court should have ruled that the plaintiff's continued prayer to be permitted to examine the books, accounts, checks, vouchers and other evidences of the dealings and business had between plaintiff and defendant, and as otherwise pleaded should have been granted and the pleadings entire regardless of counts, paragraphs, or sections or divisions, should have been considered as a whole.

27. That the court erred in rendering judgment in favor of the defendant and against the plaintiff in this action and in dismissing the plaintiff's bill, to which the plaintiff at the time duly excepted (Abstract, p. 34).

D. H. TALBOT.

I hereby certify that the cost of printing this abstract was $39.20.

D. H. TALBOT.

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49 The cause, having been fully argued by counsel of the respective parties, was on the 25th day of January duly submitted to said court on the foregoing record.

And afterwards, on the 22nd day of May, said court filed its written decision (opinion), the same being in the words and figures following, to wit :

In the Supreme Court of Iowa.

Filed May 22, '00.

DANIEL H. TALBOT, Appellant,
vs.
SIOUX NATIONAL BANK OF SIOUX CITY, IOWA, Appellee.

Appeal from Woodbury district court, Hon. Geo. W. Wakefield, judge.

Action to recover usury under section 5198 of the Revised Statute of the United States. A demurrer to the petition was sustained. Plaintiff appeals.

D. H. Talbot, for appellant.
J. S. Lothrop, for appellee.

50 SHERWIN, *J.:*

In his petition the plaintiff avers that he commenced doing business with the defendant bank about May 27th, 1889, and that on the 24th of February, 1890, he gave the defendant one ten-thousand-dollar note, in which was included usurious interest which the bank had charged the plaintiff; that on the 4th day of March, 1890, the plaintiff executed and delivered to the defendant his note for twenty-eight thousand dollars; that said note was given to cover borrowed money, the ten-thousand-dollar note of February 24, 1890, and illegal interest and charges which the bank had before made against the plaintiff.

The defendant demurred to the two counts of the petition alleging the cause of action herein stated. Several grounds were stated in the demurrer, among others, that the statute of limitations had run against the plaintiff's claim. The demurrer was sustained generally, and, the plaintiff electing to stand on his pleadings, the cause as to the claim made in counts one and two of the petition was dismissed.

The twenty-eight-thousand-dollar note was never paid by the plaintiff. A land mortgage was given to secure it, and that was foreclosed in Plymouth county, Iowa, and a decree rendered against the plaintiff thereon May 6th, 1891. The land covered by this mortgage was sold some time thereafter, just when does not certainly appear, but it was more than two years prior to the commencement of this action.

Section 5198 of the Revised Statutes of the United States provides for the recovery back of twice the amount of unlawful interest paid if the action therefor be commenced within two years from the time the usurious transaction occurred.

This action was begun Oct. 7, 1896, and at that time the plaintiff's cause of action was barred and the demurrer for that reason was properly sustained. There was no error in striking a part of the prayer from the third count of the petition.

The judgment is affirmed.

Ladd, J., took no part.

51 And on the same day a final judgment was rendered against said appellant, the record thereof being in the words and figures following, to wit:

"DANIEL H. TALBOT, Appellant, vs. SIOUX NATIONAL BANK OF SIOUX City, Iowa.	Appeal from Woodbury District Court.

In this cause, the court, being fully advised in the premises, file their written opinion affirming the judgment of the district court.

It is therefore considered by the court that the judgment of the court below be, and it is hereby, affirmed, and that a writ of *procedendo* issue accordingly.

It is further considered by the court that the appellant pay the costs of this appeal, taxed at $18.00, and that execution issue therefor."

52 And afterwards, on the 25th day of October, there was filed in the office of the clerk of said court a petition for writ of error, writ of error, bond, citation, and assignment of errors, true and correct copies of which have been retained in said clerk's office and the originals are hereto attached and made a part of the return to said writ of error.

53 Filed Oct. 25, 1900. C. T. Jones, Clerk Supreme Court.

In the Supreme Court of the State of Iowa.

DANIEL H. TALBOT, Plaintiff and Appellant, v. SIOUX NATIONAL BANK OF SIOUX CITY, IOWA, Defendant and Appellee.	Petition for Writ of Error.

And now comes Daniel H. Talbot in proper person, the above-named plaintiff and appellant, and respectfully shows the court that on or about the 22nd day of May, 1900, this court entered judgment herein in favor of the said defendant and appellee, The Sioux National Bank of Sioux City, Iowa, and against the appellant therein, this petitioner, in which judgment and the proceedings had prior thereunto in the said cause certain errors were committed to the prejudice of this petitioner, all of which will more fully and in detail appear from the assignment of errors filed herewith and made a part hereof.

This petitioner further shows that in the rendition of said judgment and in the proceedings had prior thereunto in this cause there was drawn in question and involved and specially set up and claimed by petitioner a title, right, privilege, or immunity under a
54 statute of the United States, to wit, under sections Nos. 5197 and 5198 of the Revised Statutes of the United States, and the decision in said judgment rendered was against the said title, right,

privilege, or immunity so specially set up and claimed by your petitioner.

Wherefore your petitioner prays that writ of error may be issued in this behalf from the Supreme Court of the United States to this honorable court for a correction of the errors complained of, and that a transcript of the record and proceedings and papers in this cause may be duly authenticated and transmitted to the Supreme Court of the United States.

DANIEL H. TALBOT,
In Proper Person.

J. M. WILSON,
JAMES K. REDINGTON,
A. A. HOEHLING, JR.,
Of Counsel for Petitioner.

Allowed by—
C. T. GRANGER,
Chief Justice of the Supreme Court of Iowa.

55 *Assignments of Error.*

I.

The court erred in holding and deciding upon the demurrer filed herein that the plaintiff had not stated a good and sufficient cause of action.

II.

The court erred in sustaining the demurrer of the defendant in said cause in this:

(*a.*) In holding that the first count of said petition, which purports to be for the recovery under sections Nos. 5197 and 5198 of the Revised Statutes of the United States, does not state a cause coming within the provisions of such statutes, whereas said account alleges full and sufficient cause of action under said sections.

(*b.*) In holding that the cause of action stated in the second count of the petition is barred by the limitation of section 5198 of the Revised Statutes of the United States, whereas it appears in said petition that the charges of illegal interest made against plaintiff in error by the defendant bank were made from time to time without
56 his knowledge or consent; that such transactions were fraudulently concealed from the plaintiff in error, and that knowledge of the same was not obtained by him until within two years prior to the commencement of the suit by the plaintiff in error.

(*c.*) That the second count of the petition purports to be for the recovery of unlawful interest, and that it appeared from said count that the plaintiff had paid the defendant no interest, whereas said count properly alleges and avers the payment of such unlawful interest.

III.

The court erred in sustaining the demurrer and in dismissing plaintiff's petition because upon the face of the petition it appeared

that the cause of action alleged was one arising under section No. 5198 of the Revised Statutes of the United States, and under such statute involved a right, claim, privilege, or immunity secured to him by the provisions of the said statute, and that the same is particularly and specially pleaded in said petition.

57 IV.

The court erred in affirming the judgment of the trial court sustaining the demurrer of defendant to the plaintiff's petition and in dismissing said petition, whereas in law said court should have reversed the judgment of the trial court.

DANIEL H. TALBOT,
In Proper Person.

J. M. WILSON,
JAMES K. REDINGTON,
A. A. HOEHLING, Jr.,
Of Counsel for Plaintiff in Error.

57½ [Endorsed:] Sioux nat. bk.

58 Filed Oct. 25, 1900. C. T. Jones, Clerk Supreme Court.

Writ of Error to a State Supreme Court.

UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the supreme court of the State of Iowa, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Daniel H. Talbot, plaintiff, and Sioux National Bank of Sioux City, Iowa, defendant, upon the twenty-second (22d) day of May, at the May term, 1900, thereof, wherein that in the rendition of said judgment and in the proceedings had prior thereunto in this cause there was drawn in question and involved and specially set up and claimed by petitioner a title, right, privilege, or immunity under a statute of the United States, to wit, under sections Nos. 5197 and 5198 of the Revised Statutes of the United States, and the decision in said judgment rendered was against the said title, right, privilege, or immunity so specially set up and claimed by plaintiff, a manifest error hath happened, to the great damage of the said Daniel H. Talbot, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid and all things concerning the same, together with this writ, at Wash-

ington, District of Columbia, and filed in the office of the clerk of the United States Supreme Court on or before the twenty-fourth day of November next, in the said Supreme Court to be then and
59 there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this twenty-fifth day of October, in the year of our Lord one thousand nine hundred.

[Seal U. S. Circuit Court, Southern District Iowa.]

[L. S.] EDWARD R. MASON,
Clerk of the United States Circuit Court
for the Southern District of Iowa.

Allowed by—
C. T. GRANGER,
Chief Justice of the Supreme Court of Iowa.

[Endorsed:] Writ of error.

60 Filed Oct. 25, 1900. C. T. Jones, Clerk Supreme Court.

American Surety Company of New York. Cash capital, $2,500,000. The largest and strongest surety company in the world. Court and contract bonds executed at Sioux City office.

In the Supreme Court of the State of Iowa.

DANIEL H. TALBOT, Plaintiff and Appellant,
vs.
SIOUX NATIONAL BANK OF SIOUX CITY, IOWA, Defendant and Appellee.

Know all men by these presents that Daniel H. Talbot, as principal, and American Surety Company of New York, as surety, are held and firmly bound unto the Sioux National Bank of Sioux City, Iowa, in the sum of two hundred and fifty dollars, to be paid to the said Sioux national bank or its receiver, successors, or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our heirs, executors, administrators, successors, and assigns, firmly by these presents.

Sealed with our seals and dated this 24th day of October, A. D. 1900.

Whereas the above-named Daniel H. Talbot has caused a writ of error to be sued out from the Supreme Court of the United States to the supreme court of Iowa to reverse the judgment in the above-entitled cause rendered by the said supreme court of the State of Iowa affirming the judgment of the district court of Woodbury county, Iowa, in the above-entitled cause:

Now, therefore, the condition of this obligation is such that if the above-named Daniel H. Talbot shall prosecute said writ of error to

effect and answer all costs if he shall fail to make good the said writ of error, then this obligation shall be void; otherwise to remain in full force and virtue.

[Seal American Surety Company, New York.]

DANIEL H. TALBOT, *Principal.*
AMERICAN SURETY COMPANY OF NEW YORK,
By E. W. RICE, *Resident Vice-President.*
JAMES DOUGHTY,
Resident Ass't Secretary.

{ Two 2-cent U. S. internal-revenue stamps, canceled 10, 24, 1900. Am. Surety Co. }

Approved by me this 25th day of October, 1900.

C. T. GRANGER,
Chief Justice of the Supreme Court of Iowa.

61 *Citation.*

In the Supreme Court of the State of Iowa.

DANIEL H. TALBOT, Plaintiff and Appellant,
vs.
SIOUX NATIONAL BANK OF SIOUX CITY, IOWA, Defendant and Appellee.

The United States of America to the Sioux National Bank of Sioux City, Iowa, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, District of Columbia, on the 24 day of November, 1900, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein Daniel H. Talbot — plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable C. T. Granger, Chief Justice of the supreme court of Iowa, this 25th day of October, in the year of our Lord one thousand nine hundred.

[Seal of the Supreme Court of Iowa.]

C. T. GRANGER,
Chief Justice of the Supreme Court of Iowa.

[Endorsed:] Citation.

62 STATE OF IOWA, } ss:
Woodbury County, }

I, Daniel H. Talbot, on oath depose and say that I was present when Mr. E. W. Pecaut, as deputy sheriff of Woodbury county, State of Iowa, served upon Jonathan W. Brown, receiver of the

Sioux national bank, and J. S. Lothrop, attorney of record for said bank in this case, the hereto-attached citation from the supreme court of the State of Iowa, bearing date of October 25, 1900, giving notice of the granting of a writ of error in the case of Daniel H. Talbot *v.* Sioux National Bank of Sioux City, Iowa, by said court to the Supreme Court of the United States, at Washington, D. C., and demanding appearance thereto upon the 24th day of November, 1900.

That I further swear that the said J. S. Lothrop offered, as its attorney of record, to accept service, suggesting, however, afterwards that it would be just as well for the deputy to complete his return, though his acceptance would have been made without such service.

And, further, for the purpose of supplementing my telegraphic notice to the honorable Comptroller of the Currency which I sent to him from Des Moines, Iowa, by the Western Union Telegraph Company under date of October 25, 1900, as follows: "Writ of error granted by chief justice supreme court of Iowa today, case of myself against Sioux National Bank of Sioux City, Iowa, and
63 with bond also filed with clerk of supreme court, Iowa; citation also issued by same chief justice," the following telegram, addressed to the honorable Comptroller of Currency, Washington, D. C., was sent by the Western Union Telegraph Company a few minutes after the serving of the hereto-attached citation upon the said receiver, Jonathan W. Brown, and attorney of record, J. S. Lothrop:

"Service of citation, case of Daniel H. Talbot against Sioux National Bank of Sioux City, Iowa, made upon Jonathan W. Brown, receiver for said bank, and also upon J. S. Lothrop, attorney of record.

(Signed) E. W. PECAUT,
Deputy Sheriff.
DANIEL H. TALBOT."

To all of the foregoing I do solemnly make oath, and, further, that I am the plaintiff in the case against the Sioux national bank herein named.

DANIEL H. TALBOT.

Subscribed and sworn to in Sioux City, Iowa, before me, a notary public in and for Woodbury county, in my presence, this 26th day of October, 1900, by the said Daniel H. Talbot.

[Notarial Seal, T. F. Bevington, Iowa.]

T. F. BEVINGTON,
Notary Public in and for Woodbury County, Iowa.

64 STATE OF IOWA, } ss:
Woodbury County, }

I, E. W. Pecaut, deputy sheriff in and for Woodbury county, Iowa, on oath depose and say that the within notice came into my hands for service on the 26th day of October, 1900, at 9.20 a. m., and that

I served the same on J. W. Brown, receiver of the Sioux national bank, on the said 26th day of October, 1900, at 9.45 a. m., and on the same day at 9.50 a. m. I served said notice on J. S. Lothrop; that said notice was served on each of said parties, J. W. Brown, receiver of the Sioux national bank, and J. S. Lothrop, by offering to read the said notice to each of them personally, which reading they each then and there waived, and by delivering to each of them personally a true copy thereof. All done in Sioux City, Woodbury county, Iowa, on the day and date above stated.

E. W. PECAUT.

Subscribed and sworn to before me and in my presence this 26th day of October, 1900, by the said E. W. Pecaut.

[Notarial Seal, E. G. Dilley, Iowa.]

E. G. DILLEY,
Notary Public in and for Woodbury County, Iowa.

65 STATE OF IOWA, *ss:*

I, C. T. Jones, clerk of the supreme court of Iowa, do hereby certify that the foregoing is a true and correct transcript of the record and proceedings, with all things concerning the same, in the case of Daniel H. Talbot, appellant, against The Sioux National Bank of Sioux City, Iowa, recently tried and determined in the supreme court of Iowa.

And I further certify that the petition for writ of error, assignment of errors, writ of error, bond, and citation are attached to the foregoing transcript in original form as a part of the return to said writ of error, true and correct copies thereof having been retained and lodged in my office, and this return is made in obedience to said writ.

Seal of the Supreme Court of Iowa.

In testimony whereof witness my signature and official seal, at Des Moines, Iowa, this 27th day of October, 1900.

C. T. JONES,
Clerk Supreme Court of Iowa.

Endorsed on cover: File No., 17,963. Iowa supreme court. Term No., 478. Daniel H. Talbot, plaintiff in error, *vs.* The Sioux National Bank of Sioux City, Iowa. Filed November 7, 1900.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 478.

DANIEL H. TALBOT, PLAINTIFF IN ERROR,

vs.

THE SIOUX NATIONAL BANK OF SIOUX CITY, IOWA.

Brief on Behalf of Plaintiff in Error, in Resistance of Motion to Dismiss or Affirm.

STATEMENT.

This suit is one brought under the provisions of sections 5197 and 5198, R. S. U. S., growing out of the exaction and taking of usurious interest by the defendant bank of and from plaintiff.

Section 5197 provides, in substance, that national banking associations may charge and take interest at the rate allowed by the laws of the State where such bank is located and no more, and in the event the rate of interest is not fixed by the laws of such State, then such bank may charge and take interest at a rate not exceeding seven per centum, and such interest may be taken in advance.

Section 5198 provides, in substance, that the taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall work a *forfeiture* of the entire interest which the transaction carries with it or which has been agreed to be paid thereon, and "in case the greater rate of interest has been paid, the person by whom it has been paid, * * * may recover back in action, in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred."

The plaintiff had divers business transactions with the defendant bank, both as a depositor and borrower of moneys, continuing during the years from about May 27, 1889, until the bank closed its doors, in August, 1896. During these transactions, but without the knowledge or consent of plaintiff, the defendant from time to time, knowingly and unlawfully, reserved and charged a greater rate of interest on moneys borrowed by plaintiff than allowed by the laws of the State of Iowa; all of which usurious and illegal exactions and charges of interest were carried along and continued successively in the transactions, including finally the execution and delivery by plaintiff to the bank of a certain promissory note for $28,000, dated March 1, 1890, payable on or before March 1, 1895, bearing interest at the rate of 8 per centum per annum, payable semi-annually, said interest being represented by ten interest notes, each in the sum of $1,120, payment of said principal and interest notes being secured by a certain mortgage executed and delivered by plaintiff to said bank, covering 3,290.57 acres of land in Plymouth county, Iowa; that the said $28,000 note contained and continued the illegal and usurious interest theretofore exacted and charged plaintiff by defendant bank in the prior transactions, all of which were carried into and became and were part of said final

$28,000 note. Subsequently, and because of default in payment of one of said interest notes, proceedings in foreclosure were instituted, terminating in a judgment against plaintiff on May 6, 1891, in the sum of $31,086.50, and a decree of foreclosure against the lands embraced in said mortgage; that said judgment was, in fact, entered in a sum which was $13,125.40 in excess of the amount actually due at the maturity of said note, on March 1, 1895, excluding therefrom said illegal and usurious interest; that thereafter the said lands were sold to satisfy said judgment, and on or about May 31, 1894, the same were taken possession of by defendant and one White.

That each and every of the several usurious and illegal exactions and charges was and were *knowingly* made by defendant, although plaintiff had no knowledge thereof, and aside from having subsequently discovered that usurious interest had been, in fact, exacted, charged, and taken by the bank (without his knowledge or consent), he was unable to state the exact amount thereof, severally or collectively, or the several dates upon which such charges and exactions had been made, even at the time of filing suit herein, and for the reason that all such information was in the possession and under the control of defendant, and access thereto had been denied him.

PLEADINGS.

Under the foregoing facts plaintiff, on August 29, 1896, gave notice of filing suit for the recovery of moneys provided for in said sections 5197 and 5198 (*R., 3, 4*).

This was followed by the filing of the original petition October 7, 1896 (*R., 4, 5*).

Upon motion of defendant bank, plaintiff was required to state his cause of action for *usury* in one count and his cause of action for balance claimed by him as on *deposit* in another count, and also to state the amount claimed as usury that

was paid within two years next prior to the filing of suit (*R.*, *8*).

Thereafter plaintiff filed an amended petition in three counts, the first and second of which related to the charge of *usury* and the third to the balance claimed as on *deposit* (*R.*, *9*, *20*). Count three will be omitted from the discussion herein.

To the said first and second counts demurrer was interposed by defendant, alleging, substantially, that the same did not state a cause of action coming within the provisions of said sections of the Revised Statutes, and, further, that the action is barred by the limitation prescribed in said section 5198 (*R.*, *20*, *21*).

The demurrer was sustained January 4, 1898 (*R.*, *21*), and final judgment entered dismissing said amended petition and cause of action September 29, 1898 (*R.*, *22*).

On appeal to the supreme court of the State said judgment was *affirmed* May 22, 1900 (*R.*, *32*, *33*).

BRIEF.

As will appear from the opinion rendered in the supreme court of Iowa (*R.*, *32*), the judgment of affirmance in that court, sustaining the dismissal of the plaintiff's cause of action, is based upon a finding by the court that the plaintiff's cause of action was barred by the special statute of limitations contained in section 5198.

The amended petition filed by the plaintiff set forth a cause of action under sections 5197 and 5198 of the Revised Statutes of the United States with such particularity and detail as was possible under the facts shown in said petition, namely, that the defendant bank had, from time to time, knowingly and willfully exacted, charged, and taken usurious interest within the prohibition contained in said sections of the Revised Statutes; that the same had been done

without plaintiff's knowledge, and that the several and respective amounts thereof, as well as the several dates upon which such illegal exactions and charges had been made and taken, appeared in the accounts, books, papers, and records of the defendant bank showing such transactions, all of which were in the custody and possession of defendant, and to which plaintiff had not been permitted to have access.

In other words, under the allegations of the amended petition, the case presented was one where it was alleged that, in a series of transactions, the defendant bank had knowingly exacted, charged, and taken usurious interest, within the prohibition of the sections aforesaid; that the plaintiff had been kept in ignorance thereof, and thereafter, having ascertained that such illegal and usurious exactions had been made, suit was filed, as expressly authorized by law, although even at that time plaintiff did not have knowledge of the exact amount of such illegal charges or the respective dates upon which the same had been made, and that that information was kept from him by the defendant. To that petition a demurrer was interposed by the defendant, based substantially upon an averment that the facts stated did not constitute a cause of action; and, further, that the cause of action, if any, was barred by the statute of limitations provided for in section 5198. The record herein discloses that the case was decided upon the question of the statute of limitations.

The effect of such demurrer is that the bank admitted that it had knowingly charged, exacted, and taken during the years usurious interest, within the prohibition of the statute; that the plaintiff had no knowledge thereof at the time the several transactions occurred, and that all such information and knowledge had been kept from plaintiff by defendant, not only at the time of such several transactions, but also even up to and including the time of filing suit, including as well a denial to plaintiff of access to the books, accounts,

and records of the bank containing such transactions between it and plaintiff; all of which admissions the bank sought to overcome by the bare allegation that, because more than two years had elapsed between the date of the last alleged usurious transaction and the time of filing suit, therefore the cause of action was barred. This view was concurred in by the trial and appellate courts, and the cause of action accordingly dismissed. It is submitted that in this the court erred.

It is to be borne in mind that the right asserted by plaintiff was one secured to him by the provisions of Federal law, and attached to such law was a special statute of limitations; so that, in deciding the present case, the court, while at least tacitly admitting the statement of a good cause of action under such Federal law, proceeded to interpret the statute of limitations contained in the same law which created the cause of action, and held that such statute of limitation barred the remedy. Hence it follows that the court did not merely find a fact which, in and of itself, was sufficient to overcome plaintiff's right of recovery (as claimed in the briefs filed in support of the motion to dismiss or affirm herein), but it has undertaken to interpret the scope, meaning, and effect to be given a certain special statute of limitations attached to and made a part of the very law which created the cause of action and afforded the remedy.

Under the facts stated in the pleadings the transactions between plaintiff and defendant, tainted with usury, continued during the years, terminating in a certain promissory note for $28,000, dated March 1, 1890, and maturing on or before March 1, 1895. The payment of this note was secured by a real-estate mortgage, under which foreclosure proceedings were subsequently had, and judgment in foreclosure entered, resulting in a sale of the lands and the taking possession thereof by the bank on or about May 31, 1894.

It may be here remarked that this foreclosure was had not

because of any default in the payment of the principal indebtedness, but because of default only in the payment of interest on the principal indebtedness, and this notwithstanding the fact that under the provisions of said section 5197 all interest became and was *forfeited* because tainted with usury, and hence not only could not be recovered in suit, but likewise could not create a default in payment for the purposes of foreclosure.

The court below evidently treated the date of the payment of the usurious interest as having been made, in contemplation of law, at least on or before, but not after, said date when possession of the said lands was so taken, and that inasmuch as suit was not instituted until more than two years thereafter, the cause of action was then barred.

There can be no doubt under the decided cases that, under the allegations of the petition, a good cause of action was stated, and that, notwithstanding the usurious interest may be included, continued, and carried into successive renewal notes, the obligation to sue for the recovery of the penalties provided by said section 5198 does not arise until the actual *payment* of the usurious interest, in whatever form that payment may be made or enforced, and that then for the first time the statute of limitations of two years commences to run (Brown *vs.* Marion National Bank, *169 U. S., 416*). It may be conceded, for the purposes of the present case, that if the plaintiff had had knowledge of the fact that the bank had made this illegal exaction and charge of usurious interest at the time of the transaction or at the time when the same was collected from him by the bank by the taking of plaintiff's lands under said foreclosure proceedings on or about May 31, 1894, the statute would have commenced to run from that time, and in that case it would have been incumbent upon him to have brought suit within two years from that date, but while the bank had knowingly made these illegal exactions and charges, knowledge thereof had

been kept by it from the plaintiff, and hence it was not incumbent upon him to sue until he actually discovered what had been so concealed from him, namely, the usurious character of the transactions, from which time only the statute of limitations could run against him.

This is a familiar exception, which, it would seem from an examination of the authorities, the courts have uniformly attached to statutes of limitation, even though such exception be not specially provided for in the statute itself, namely, that where a cause of action has been fraudulently concealed by the defendant the statute will not run until the discovery of the wrong. This has been so repeatedly held by this court that citation of authority in respect of the rule is deemed unnecessary.

This court has also attached to section 5057 of the Revised Statutes (which section contained a statute of limitation of two years in respect of certain litigation between assignees in bankruptcy and persons claiming adversely) a qualification that fraudulent concealment would prevent the running of the statute until the discovery of the fraud (Pearsall *vs.* Smith, *149 U. S., 236*).

It would seem, therefore, that plaintiff not only stated a good cause of action against the bank, under sections 5197 and 5198, but he also pleaded such concealment as removed from his case the bar of the statute of limitations provided for in the section. Notwithstanding this, however, the court followed what would seem to be the unusual course of dismissing a case upon demurrer because of the supposed bar of the statute of limitations disclosed in the petition, and placed its own interpretation upon section 5198 by declining to attach to that section the qualification which this court has attached to all other similar statutes of limitation, namely, that in cases of fraudulent concealment such statutes do not begin to run until the discovery of the fraud.

Under this state of facts and decisions it is submitted that

the court below did not dispose of this case on a mere finding of fact, but that it interpreted section 5198 in respect of the statute of limitations; that its interpretation is erroneous, and that the judgment of dismissal herein was a denial to plaintiff of a right secured to him by said section 5198 of the Revised Statutes.

Respectfully submitted.

JEREMIAH M. WILSON,
JAMES K. REDINGTON,
A. A. HOEHLING, JR.,
Attorneys for Plaintiff in Error.

WASHINGTON, D. C., *January* 7, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 190.

DANIEL H. TALBOT, PLAINTIFF IN ERROR,

vs.

THE SIOUX NATIONAL BANK OF SIOUX CITY, IOWA.

Brief on Behalf of Plaintiff in Error.

STATEMENT.

This suit is one brought under the provisions of sections 5197 and 5198, R. S. U. S., growing out of the exaction and taking of usurious interest by the defendant bank of and from plaintiff.

Section 5197 provides, in substance, that national banking associations may charge and take interest at the rate allowed by the laws of the State where such bank is located and no more, and in the event the rate of interest is not fixed by the laws of such State, then such bank may charge and take interest at a rate not exceeding seven per centum, and such interest may be taken in advance.

Section 5198 provides, in substance, that the taking, re-

ceiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall work a *forfeiture* of the entire interest which the transaction carries with it or which has been agreed to be paid thereon, and "in case the greater rate of interest has been paid, the person by whom it has been paid, * * * may recover back in action, in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred."

The plaintiff had divers business transactions with the defendant bank, both as a depositor and borrower of moneys, continuing during the years from about May 27, 1889, until the bank closed its doors, in August, 1896. During these transactions, but without the knowledge or consent of plaintiff, the defendant from time to time, knowingly and unlawfully, reserved and charged a greater rate of interest on moneys borrowed by plaintiff than allowed by the laws of the State of Iowa; all of which usurious and illegal exactions and charges of interest were carried along and continued successively in the transactions, including finally the execution and delivery by plaintiff to the bank of a certain promissory note for $28,000, dated March 1, 1890, payable on or before March 1, 1895, bearing interest at the rate of 8 per centum per annum, payable semi-annually, said interest being represented by ten interest notes, each in the sum of $1,120, payment of said principal and interest notes being secured by a certain mortgage executed and delivered by plaintiff to said bank, covering 3,290.57 acres of land in Plymouth county, Iowa; that the said $28,000 note contained and continued the illegal and usurious interest theretofore exacted and charged plaintiff by defendant bank in the prior transactions, all of which were carried into and became and were part of said final $28,000 note. Subsequently, and because of default in pay-

ment of one of said interest notes, proceedings in foreclosure were instituted, terminating in a judgment against plaintiff on May 6, 1891, in the sum of $31,086.50, and a decree of foreclosure against the lands embraced in said mortgage; that said judgment was, in fact, entered in a sum which was $13,125.40 in excess of the amount actually due at the maturity of said note, on March 1, 1895, excluding therefrom all interest; that thereafter the said lands were sold to satisfy said judgment, and on or about May 31, 1894, the same were taken possession of by defendant and one White.

That each and every of the several usurious and illegal exactions and charges was and were *knowingly* made by defendant, although plaintiff had no knowledge thereof, and aside from having subsequently discovered that usurious interest had been, in fact, exacted, charged, and taken by the bank (without his knowledge or consent), he was unable to state the exact amount thereof, severally or collectively, or the several dates upon which such charges and exactions had been made, even at the time of filing suit herein, and for the reason that all such information was in the possession and under the control of defendant, and access thereto had been denied him.

PLEADINGS.

Under the foregoing facts plaintiff, on August 29, 1896, gave notice of filing suit for the recovery of moneys provided for in said sections 5197 and 5198 (*R., 3, 4*).

This was followed by the filing of the original petition October 7, 1896 (*R., 4, 5*).

Upon motion of defendant bank, plaintiff was required to state his cause of action for *usury* in one count and his cause of action for balance claimed by him as on *deposit* in another count, and also to state the amount claimed as usury that was paid within two years next prior to the filing of suit (*R., 8*).

Thereafter plaintiff filed an amended petition in three counts, the first and second of which related to the charge of *usury* and the third to the balance claimed as on *deposit* (*R.*, *9*, *20*). Count three will be omitted from the discussion herein.

To the said first and second counts demurrer was interposed by defendant, alleging, substantially, that the same did not state a cause of action coming within the provisions of said sections of the Revised Statutes, and, further, that the action is barred by the limitation prescribed in said section 5198 (*R.*, *20*, *21*).

The demurrer was sustained January 4, 1898 (*R.*, *21*), and final judgment entered dismissing said amended petition and cause of action September 29, 1898 (*R.*, *22*).

On appeal to the supreme court of the State said judgment was *affirmed* May 22, 1900 (*R.*, *32*, *33*).

Thereupon the cause was brought to this court by writ of error (*R.*, *35*, *36*).

BRIEF.

As will appear from the opinion rendered in the supreme court of Iowa (*R.*, *32*), the judgment of affirmance in that court, sustaining the dismissal of the plaintiff's cause of action, is based upon a finding by the court that the plaintiff's cause of action was barred by the special statute of limitations contained in section 5198.

The amended petition filed by the plaintiff set forth a cause of action under sections 5197 and 5198 of the Revised Statutes of the United States with such particularity and detail as was possible under the facts shown in said petition, namely, that the defendant bank had from time to time knowingly and willfully exacted, charged, and taken usurious interest within the prohibition contained in said sections of the Revised Statutes; that the same had been done without plaintiff's knowledge, and that the several and re-

spective amounts thereof, as well as the several dates upon which such illegal exactions and charges had been made and taken, appeared in the accounts, books, papers, and records of the defendant bank showing such transactions, all of which were in the custody and possession of defendant, and to which plaintiff had not been permitted to have access (*R., 9, 20*).

In other words, under the allegations of the amended petition, the case presented was one where it was alleged that, in a series of transactions, the defendant bank had knowingly exacted, charged, and taken usurious interest, within the prohibition of the sections aforesaid; that the plaintiff had been kept in ignorance thereof, and thereafter, having ascertained that such illegal and usurious exactions had been made, suit was filed, as expressly authorized by law, although even at that time plaintiff did not have knowledge of the exact amount of such illegal charges or the respective dates upon which the same had been made, and that that information was kept from him by the defendant. To that petition a demurrer was interposed by the defendant, based substantially upon an averment that the facts stated did not constitute a cause of action; and, further, that the cause of action, if any, was barred by the statute of limitations provided for in section 5198. The record herein discloses that the case was decided upon the question of the statute of limitations.

The effect of such demurrer is that the bank admitted that it had knowingly charged, exacted, and taken during the years usurious interest, within the prohibition of the statute; that the plaintiff had no knowledge thereof at the time the several transactions occurred, and that all such information and knowledge had been kept from plaintiff by defendant, not only at the time of such several transactions, but also even up to and including the time of filing suit, including as well a denial to plaintiff of access to the books, accounts, and records of the bank containing such transactions be-

tween it and plaintiff; all of which admissions the bank sought to overcome by the bare allegation that, because more than two years had elapsed between the date of the last alleged usurious transaction and the time of filing suit, therefore the cause of action was barred. This view was concurred in by the trial and appellate courts, and the cause of action accordingly dismissed. It is submitted that in this the court erred.

It is to be borne in mind that the right asserted by plaintiff was one secured to him by the provisions of Federal law, and attached to such law was a special statute of limitations; so that, in deciding the present case, the court, while at least tacitly admitting the statement of a good cause of action under such Federal law, proceeded to interpret the statute of limitations contained in the same law which created the cause of action, and held that such statute of limitation barred the remedy. Hence it follows that the court did not merely find a fact which, in and of itself, was sufficient to overcome plaintiff's right of recovery, but it has undertaken to interpret the scope, meaning, and effect to be given a certain special statute of limitations attached to and made a part of the very law which created the cause of action and afforded the remedy.

Under the facts stated in the pleadings the transactions between plaintiff and defendant, tainted with usury, continued during the years, terminating in a certain promissory note for $28,000, dated March 1, 1890, and maturing on or before March 1, 1895. The payment of this note was secured by a real-estate mortgage, under which foreclosure proceedings were subsequently had, and judgment in foreclosure entered, resulting in a sale of the lands and the taking possession thereof by the bank on or about May 31, 1894.

It may be here remarked that this foreclosure was had not because of any default in the payment of the principal indebtedness, but because of default only in the payment of

interest on the principal indebtedness, and this notwithstanding the fact that under the provisions of said section 5197 all interest became and was *forfeited* because tainted with usury, and hence not only could not be recovered in suit, but likewise could not create a default in payment for the purposes of foreclosure.

The court below evidently treated the payment of the usurious interest as having been made, in contemplation of law, at least on or before, but not after, said date when possession of the said lands was so taken, and that inasmuch as suit was not instituted until more than two years thereafter, the cause of action was then barred.

There can be no doubt under the decided cases that, under the allegations of the petition, a good cause of action was stated, and that, notwithstanding the usurious interest may be included, continued, and carried into successive renewal notes, the obligation to sue for the recovery of the penalties provided by said section 5198 does not arise until the actual *payment* of the usurious interest, in whatever form that payment may be made or enforced, and that then for the first time the statute of limitations of two years commences to run (Brown *vs.* Marion National Bank, *169 U. S., 416*). It may be conceded, for the purposes of the present case, that if the plaintiff had had knowledge of the fact that the bank had made this illegal exaction and charge of usurious interest at the time of the transaction or at the time when the same was collected from him by the bank by the taking of plaintiff's lands under said foreclosure proceedings on or about May 31, 1894, the statute would have commenced to run from that time, and in that case it would have been incumbent upon him to have brought suit within two years from that date, but while the bank had knowingly made these illegal exactions and charges, knowledge thereof had been kept by it from the plaintiff, and hence it was not incumbent upon him to sue until he actually discovered what had been so concealed from him, namely, the usurious char-

acter of the transactions, and the actual collection of such usurious interest from him, from which time only the statute of limitations could run against him.

This is a familiar exception, which, it would seem from an examination of the authorities, the courts have uniformly attached to statutes of limitation, even though such exception be not specially provided for in the statute itself, namely, that where a cause of action has been fraudulently concealed by the defendant the statute will not run until the discovery of the wrong. This has been so repeatedly held by this court that citation of authority in respect of the rule seems almost unnecessary.

This court has also attached to section 5057 of the Revised Statutes (which section contained a statute of limitation of two years in respect of certain litigation between assignees in bankruptcy and persons claiming adversely) a qualification that fraudulent concealment would prevent the running of the statute until the discovery of the fraud (Pearsall *vs.* Smith, *149 U. S., 236*).

See also to the same effect the following:

Bank of U. S. *vs.* Moss, *6 How., 37.*
Page *vs.* Bank of Alexandria, *7 Wheat., 35.*
Penn *vs.* Flack, *3 G. & J., 369.*
Lewis *vs.* Kramer, *3 Md., 265.*
Hopkins *vs.* Kent, *17 Id., 113, 120.*
Stone *vs.* Lawrence, *4 Cranch* (*C. C.*), *11.*
Randon *vs.* Toby, *11 How., 521.*
Moses *vs.* Taylor, *6 Mackey D. C., 255, 281.*

It would seem, therefore, that plaintiff not only stated a good cause of action against the bank, under sections 5197 and 5198, but he also pleaded such concealment as removed from his case the bar of the statute of limitations provided for in the section. Notwithstanding this, however, the court followed what would seem to be the unusual course of dismissing a case upon demurrer because of the supposed bar of the statute of limitations disclosed in the petition, and

placed its own interpretation upon section 5198 by declining to attach to that section the qualification which this court has attached to all other similar statutes of limitation, namely, that in cases of fraudulent concealment such statutes do not begin to run until the discovery of the fraud.

Under this state of facts and decisions it is submitted that the court below did not dispose of this case on a mere finding of fact, but that it interpreted section 5198 in respect of the statute of limitations; that its interpretation is erroneous; that the judgment of dismissal herein was a denial to plaintiff of a right secured to him by said section 5198 of the Revised Statutes, and that the same should be *reversed.*

Counsel for defendant herein contend that no Federal question is involved in the decision here sought to be reviewed. This same objection was before reached in a motion to dismiss or affirm, in resistance of which counsel for plaintiff filed printed brief; and to which printed brief counsel respectfully ask the attention of the court.

In conclusion, counsel respectfully call the attention of the court to the fact that by order of the court this case is to be heard immediately following case No. 164, in both of which cases is involved section 5198 of the Revised Statutes of the United States, as well as its proper application to the transactions covered in this and said other case, the plaintiff in error being the same in each. In that case, No. 164, counsel have filed an extended brief, in which will be found set forth at some length the various decisions of this court bearing upon the questions of law arising under said section 5198, as well as the rule of decision thereunder. Counsel therefore respectfully ask that in connection with the present case, the court will consider the printed brief so filed in said other case, No. 164.

JAMES K. REDINGTON,
A. A. HOEHLING, JR.,
Attorneys for Plaintiff in Error.

WASHINGTON, D. C., *January*, 1902.

No. 178 & 190.
Motion to Dismiss or Affirm.
DEC 10 1900

In the Supreme Court of the United States.

October Term, 1900.

No. 178
Filed Dec. 10, 1900.

DANIEL H. TALBOT,
Plaintiff in Error,

vs.

THE SIOUX NATIONAL BANK OF SIOUX CITY, IOWA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

MOTION TO DISMISS OR AFFIRM, WITH PROOF OF SERVICE.

FRANCIS F. OLDHAM,
Attorney for Defendant.

(17,893.)

W. H. Anderson & Co., Law Publishers, Cincinnati, Ohio.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 478.

DANIEL H. TALBOT, *Plaintiff in Error,*

vs.

THE SIOUX NATIONAL BANK OF SIOUX CITY, IOWA.

MOTION TO DISMISS OR AFFIRM.

Comes now the defendant herein, by Francis F. Oldham, its attorney, appearing in that behalf, and moves the court to dismiss the writ of error in the above entitled cause for want of jurisdiction because the judgment to which the writ of error is taken is the judgment of the Supreme Court of one of the United States, to wit, the Supreme Court of the State of Iowa, and in the rendition of said judgment and in the proceedings had prior thereto there was not drawn in question or involved any title, right, privilege or immunity under any statute of the United States.

And the said defendant, by counsel as aforesaid, also moves the court to affirm the said judgment to which said writ of error has been allowed and taken, because, although

the record in said cause may show that this court has jurisdiction in the premises, yet it is manifest that the said writ of error has been taken for delay only, and that the question on which the jurisdiction of this court depends is so frivolous as not to need argument.

Francis F. Oldham

Attorney for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 478.

DANIEL H. TALBOT, *Plaintiff in Error,*
vs.
THE SIOUX NATIONAL BANK OF SIOUX CITY, IOWA.

NOTICE OF SUBMISSION OF MOTION TO DISMISS OR AFFIRM.

To Daniel H. Talbot,
Plaintiff in Error.

Please take notice that on Monday, the 7th day of January, 1901, at the opening of court, or as soon thereafter as counsel can be heard, a motion to dismiss or affirm, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of the court thereon. Enclosed herewith is a copy of the brief and argument to be submitted with said motion in support thereof.

Cincinnati, Ohio, December 7, 1900.

Francis F. Oldham

Attorney for Defendant in Error.

State of Ohio, Hamilton County, ss.

Francis F. Oldham, being first duly sworn, deposes and says that on the 7th day of December, A. D. 1900, he deposited in the mail at the postoffice in the City of Cincinnati, Ohio, a notice of the motion to dismiss or affirm, of which the foregoing is a true copy, together with a copy of his brief and argument on behalf of defendant, duly postpaid and addressed to Mr. Daniel H. Talbot, Sioux City, Iowa, which is the proper address of said plaintiff in error. And further he saith not.

Francis F. Oldham

Subscribed in my presence and sworn to before me this 7th day of December, A. D. 1900.

W. F. Murray,
Notary Public, Hamilton County, Ohio.

[NOTARIAL SEAL.]

No. 478. 1900.

DEC 10 1900

JAMES H. McKENNEY, Clerk.

Br. of Oldham for D. C. Mo.

In the Supreme Court of the United States.

Filed Dec. 10, 1900.

October Term, 1900.

No. 478.

DANIEL H. TALBOT,
Plaintiff in Error,

vs.

SIOUX NATIONAL BANK, OF SIOUX CITY, IOWA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

BRIEF FOR DEFENDANT ON MOTION TO DISMISS OR AFFIRM.

FRANCIS F. OLDHAM,
Attorney for Defendant.

(17,963.)

W. H. ANDERSON & CO., Law Publishers, Cincinnati, Ohio.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 478.

DANIEL H. TALBOT,
Plaintiff in Error,

vs.

THE SIOUX NATIONAL BANK OF SIOUX CITY, IOWA.

Brief for Defendant on Motion to Dismiss or Affirm.

STATEMENT.

The plaintiff in error, Daniel H. Talbot, on the seventh day of October, 1896, filed his petition against The Sioux

National Bank of Sioux City, Iowa, and James F. Toy, President of said Bank, in the District Court of the State of Iowa, in and for Woodbury County, praying judgment against them for the sum of $16,250, with interest and costs, on account of usurious interest alleged to have been taken from plaintiff "within seven years past," and on account of a balance of $250.00 deposited in the bank by plaintiff, and never withdrawn. (Record, pp. 4, 5.)

The defendant, James H. Toy, filed a demurrer to the petition. which was sustained. (Record, p. 8.)

On motion of The Sioux National Bank, plaintiff was required to set forth his cause of action for usury in one count, and his cause of action for the deposit in another count; also to state the amount of usury paid within two years prior to the commencement of the action. (Record, p. 8.)

Plaintiff, thereupon, on May 20, 1897, filed his amended petition against The Sioux National Bank of Sioux City, Iowa, containing three counts.

The first and second counts set forth what are alleged to be the usurious transactions. It is not alleged that any interest was ever *paid*. It is alleged that in a series of transactions between May 27, 1889, and March 4, 1890, in which plaintiff borrowed money from the bank, usurious interest was added to the amount of the several notes, and that, on March 4, 1890, the total indebtedness, including the amount of the usurious interest charged by the bank, was evidenced by a note for $28,000, dated March 1, 1900, made by plaintiff to A. S. Garretson, or bearer, and secured by a mortage upon the real estate of said plaintiff. (Record, pp. 9-15.)

It is further alleged that, before the maturity of this

note for $28,000, on account of the nonpayment of interest thereon, the mortgage was foreclosed by a judgment rendered on or about the sixth day of May, 1891, in the District Court of Plymouth County, Iowa, where the real estate was situated, and under said judgment said real estate was sold. (Record, p. 14.) It is not alleged when the real estate was sold, nor what amount was realized from the sale. It is, however, stated that the purchasers took possession on or about the thirty-first day of May, 1894, from which it may be fairly inferred, and was apparently inferred by the Supreme Court of Iowa, that the sale took place prior to that date. (Record, p. 14.)

As to the third count of the amended petition, plaintiff was ordered to make it more specific (Record, p. 22), and, having failed to do so, it was dismissed (Record, p. 22).

A demurrer was filed by The Sioux National Bank to the first and second counts of the amended petition. Among other grounds stated in the demurrer were a failure to comply with the order of the court to make the petition more specific, and the insufficiency of the petition in law. (Record, pp. 20, 21.) The demurrer was sustained generally (Record, p. 21), and plaintiff failing further to amend the petition was dismissed, and final judgment was rendered for defendant's costs. (Record, p. 22.) On appeal, the judgment was affirmed by the Supreme Court of Iowa on the ground that the petition, as amended, failed to show that any usury was paid within two years prior to the commencement of the action. (Record, p. 32.) Plaintiff in error seeks to have the judgment of affirmance re-examined in this court, upon a writ of error.

ARGUMENT.

I.

The record presents no federal question.

(a) Upon motion of defendant, the trial court ordered plaintiff in his amended petition "to state the amount claimed as usury that was paid within two years next prior to the commencement of this cause of action." (Record, p. 8.) Under this order it was the duty of plaintiff to state, unequivocally, whether any usurious interest was received by the bank within two years, and if any, how much. The order was entirely disregarded. The amended petition simply states facts from which it may be inferred that possibly usurious interest may have been received by means of the foreclosure sale, and probably, if any such interest were received, it was received more than two years before the commencement of the suit. The sixth ground of demurrer by defendant to the amended petition is, that plaintiff "has failed to comply with the former order of the court in this case to make his petition more specific" (Record, p. 21). The demurrer was sustained generally (Record, p. 21). And the petition was dismissed on the demurrer after the failure of plaintiff further to plead. (Record, p. 21.) One ground for the dismissal may well have been the failure of plaintiff to state the facts specifically in regard to the amount realized from the sale, and when realized. These facts were easily accessible to plaintiff.

Section 3764, of the Annotated Code of Iowa, 1897,

provides that an action may be dismissed by the court "for disobedience by the party of an order concerning the pleadings, or any proceeding in the action."

The judgment of dismissal can be sustained, therefore, on the ground that plaintiff disobeyed the order of the court.

To give the Supreme Court of the United States jurisdiction of a writ of error to a state court it must appear affirmatively, not only that a federal question was involved, but that the judgment as rendered could not have been given without deciding such question.

De Saussure vs. Gaillard, 127 U. S. 216.
Johnson vs. Risk, 137 U. S. 300.

(b) There is no color for any claim by plaintiff under a statute of the United States.

The amended petition of plaintiff does not state that any interest was ever paid by plaintiff to the bank. It contains three obvious and fatal defects, either one of which shows conclusively that plaintiff's pretended claim, under section 5198, of the Revised Statutes of the United States is utterly without foundation.

Section 5198 first provides for the forfeiture of all interest upon the usurious note or bill, and relates only to the defensive rights of the borrower. Farmers and Merchants National Bank vs. Dearing, 91 U. S. 32. It then provides as follows: "In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back in an action, in the nature of an action of debt, twice the amount of the interest thus paid from the association, taking or receiving the same, provided such action is commenced within two years from the time the usurious transaction occurred."

First, it is reasonably certain from the averments of the petition that the Bank received no part of the money borrowed by plaintiff, or any interest thereon after it took possession of the land sold under foreclosure proceedings, that is to say, on or about May 31, 1894. As the suit was not commenced until August 29, 1896 (Record, p. 4), there was no cause of action by the express terms of the proviso of section 5198.

Norfolk National Bank vs. Schwenk, 46 Neb. 381.
Bobo vs. Peoples National Bank, 92 Tenn. 444.
Higley vs. First National Bank, 26 Ohio State 75.

This was the ground upon which the Supreme Court of Iowa affirmed the decision of the lower court. (Record, p. 32.)

Secondly, it appears that the only way in which the Bank received any payment on account of the note, which embraced all the former usurious interest agreed to be paid, was by the purchase of the mortgaged premises. It is not stated that the land was sold for more than sufficient to pay the principal sum originally borrowed without interest, nor is it stated that any usury was paid by the foreclosure sale. Whatever was realized from such sale would be applied on the principal, and not on the illegal interest.

McBroom vs. Scottish Investment Co., 153 U. S. 330.
Bank of Cadiz vs. Slemmons, 34 Ohio State 142.

There is no allegation, therefore, nor is there any from which it can be reasonably inferred that the Bank at any time received any interest whatever, directly or indirectly.

Thirdly, the only way in which it is alleged interest

might have been received by the Bank was by enforcement of a judgment of a court of competent jurisdiction in an action brought on behalf of defendant against plaintiff. (Record, p. 14.) The petition itself, therefore, shows that the question of usury reserved in the note sued upon is *res judicata*, and was decided adversely to plaintiff. In that action plaintiff had the right to have the entire interest forfeited if the note embraced usury. This was the full measure of his right and his only remedy. The statute gives him no option to permit judgment to be taken against him and then to recover double the amount of interest collected from him by the law. That would be putting a premium upon the abuse of judicial administration. The ordinary rule of *res judicata* applies. Plaintiff having had his day in court is estopped to reopen the question whether the note embraced usury or not.

Kearney vs. First National Bank, 129 Pa. St. 577.

Hopkins vs. West, 83 Pa. St. 109.

Montagu vs. McDowell, 99 Pa. St. 265.

And it is immaterial whether usury were pleaded in the first action or not.

Heath vs. Frackleton, 20 Wis. 320.

Nor will equity relieve against a judgment at law upon a usurious note when usury might have been pleaded but was not.

Lucas vs. Spencer, 27 Ill. 15.

Chinn vs. Mitchell, 2 Met. (Ky.) 92.

Brown vs. Toell, 5 Rand. 543.

The plaintiff having manifestly failed to state any legal claim under section 5198 of the Revised Statutes of the United States, there is no federal question involved giving jurisdiction to the Supreme Court of the United States.

Section 709 of the Revised Statutes of the the United States, so far as it applies to this suit, is as follows: "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, . . . where any title, right, privilege, or immunity is claimed under . . . any . statute of . . the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party, under . . such statute, . . may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error . . ."

In Wilson vs. State of North Carolina, 169 U. S. 586, Mr. Justice Peckham, in construing this section, says: "Upon the case made by the plaintiff in error, the federal question which he attempts to raise is so unfounded in substance that we are justified in saying that it does not really exist; that there is no fair color for claiming that his rights under the federal constitution have been violated, etc." And he quotes with approval from Hamblin vs. Land Co., 147 U. S. 531, where it is said "a real, and not a fictitious, federal question is essential to the jurisdiction of this court over the judgment of state courts"; also from New Orleans vs. New Orleans Waterworks Co., 142 U. S. 79, 87, where it is said "The bare averment of a federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a federal question might be set up almost in any case, and the jurisdiction of this court invoked simply for the purpose of delay."

The same principle is maintained in St. L. C. G. & Ft. S. Ry. Co. vs. State of Missouri, 156 U. S. 478.

It is respectfully submitted that the petition of plaintiff fails to give color to any right under a statute of the United States. Merely reciting a statute, as plaintiff has done, does not constitute a claim of right. The only right of *action* given by the statute is an "action, in the nature of an action of debt" to recover twice the amount of the interest paid within two years. Section 5198, Revised Statutes of United States. A petition which does not state that any interest was paid within two years can hardly be said to "set up and claim" a right under the statute.

II.

If it be held, however, that this court has jurisdiction, then it is respectfully submitted that the question presented for re-examination is so clearly without merit as not to need further argument, and that the judgment of the Supreme Court of Iowa should be affirmed.

Abbott vs. National Bank of Commerce, 175 U. S. 419, 414.

Respectfully submitted,

FRANCIS F. OLDHAM,
Attorney for Defendant.

In the Supreme Court of the United States,

OCTOBER TERM, 1900.

No. 478.

DANIEL H. TALBOT,
PLAINTIFF IN ERROR,
vs.
SIOUX NATIONAL BANK, OF SIOUX CITY, IOWA,
DEFENDANT IN ERROR.

Brief of Associate Counsel for Defendant on Motion to Dismiss or Affirm.

ARGUMENT.

THE RECORD PRESENTS NO FEDERAL QUESTION.

The Supreme Court of Iowa based its decision solely upon the finding of fact that the usurious transaction complained of,

if any, occurred "more than two years prior to the commencement of this action." (Record, p. 32.)

On error this court will not review a question of fact found by the Supreme Court of Iowa.

Hedrick vs. Atchison T. & S. F. R. R. Co., 167 U. S. 673.

Egan vs. Hart, 165 U. S., 193.

Dower vs. Richards, 151 U. S., 658.

We submit that the finding by the Supreme Court of Iowa on the defendant's demurrer to plaintiff's petition that the usurious transaction, if any, occurred "more than two years prior to the commencement of this action" has the same force and effect in this court as would a finding of fact based on evidence. The demurrer admitted all the allegations of the petition, and imposed upon the Iowa court the duty of ascertaining what facts were thereby established.

This finding of fact is based on the admitted allegations of the petition. The Iowa court interpreted these admitted allegations in the light of the Iowa practice and procedure, and of the following provisions of the Iowa Code:

Section 2922 of the Code of Iowa, provides that "In the absence of stipulations to the contrary, the mortgagor of real estate retains the legal title and right of possession thereto."

Section 4045 of the Code of Iowa, provides that, "The debtor may redeem real property at any time within one year from the day of sale, and will, in the meantime, be entitled to the possession thereof."

Section 4054 of the Code of Iowa, provides that,

"Unless the defendant redeems, the purchaser, or the creditor who has last redeemed prior to the expiration of the nine months aforesaid, will hold the property absolutely."

Section 4062 of the Code of Iowa, provides that,

"If the debtor or his assignee fails to redeem, the sheriff

then in office must, at the end of the year, execute a deed to the person who is entitled to the certificate as hereinbefore provided, or to his assignee."

In Iowa, therefore, the purchaser's right to a deed and possession first accrued one year after the foreclosure sale. The fact, but not the date of this sale appears, but this sale must have been at least one year prior to the taking of possession, which is alleged to have taken place May 31, 1894. The Iowa court concludes: "This action was begun October 7, 1896, and at that time the plaintiff's cause of action was barred."

While the Iowa court, as an aid to the interpretation of the allegations of the petition held in mind the Iowa practice and procedure and the foregoing provisions of the Iowa Code, nevertheless, the Iowa court had recourse, if at all, only to Iowa, and not to Federal law as an aid to its interpretation and construction of the fact established by the admitted allegations of the petition on demurrer, and its finding that the usurious transaction, if any, occurred "more than two years prior to the commencement of this action" (Record p. 32) is a conclusion of fact drawn from the allegations of the petition explained by presumptions arising from the aforesaid sections of the Code of Iowa.

The mere application of section 5198 of the Revised Statutes of the United States to this established fact does not present a case in which a Federal statute is drawn into question.

If these contentions are well taken, then there is no Federal question involved.

This court has no jurisdiction of this case on error, because the allegations of the petition in error fail to show that the controversy was determined or determinable by one of two or more conflicting constructions of the Federal statute, but do affirmatively show that the action was determinable and determined on a mere question of fact in which the meaning, con-

struction or validity of the Federal statute was not drawn into question. To give this court jurisdiction, on this writ of error, it must appear by apt allegations not only that the application of the Federal statute was involved, but that the controversy was actually determined by a construction put upon the Federal statute adverse to the contention of the plaintiff in error.

Blackburn vs. Portland Gold Mining Co., 175 U. S., 571, 585-6.

Shoshone Mining Co., vs. Rutter, 177 U. S., 514.

Respectfully submitted,

ASA F. CALL,

HENRY J. TAYLOR,

Associate Counsel for Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 190.

DANIEL H. TALBOT,
Plaintiff in Error,

vs.

THE SIOUX NATIONAL BANK OF SIOUX CITY, IOWA.

BRIEF FOR DEFENDANT.

STATEMENT.

The motion to dismiss the writ of error in this cause for want of jurisdiction, being now under advisement by this court, it is unnecessary to repeat the full Statement of the case made in the brief for defendant on said motion.

The original action was begun in the District Court of Woodbury County, Iowa, by petition filed October 7, 1896. Plaintiff, having been required by the court to amend, filed his amended petition May 20, 1897, containing three counts. The third count of the amended petition was dismissed by the court for failure to make it more specific, and the complaint therein contained is no longer in controversy (Record, p. 22). The first and second counts set forth what purports to be a single cause of action. A demurrer was sustained to these two counts by the District Court of Woodbury County (Record, p. 21), and on appeal to the Supreme Court of Iowa the cause of action was construed as one for the recovery of usury under Section 5198 of the Revised Statutes of the United States. On the ground that it appears in the petition that the action was not commenced within two years from the time of the alleged usurious transaction, the Supreme Court of Iowa affirmed the judgment of the lower court (Record, p. 32).

It is sought, by a writ of error from this court to the Supreme Court of Iowa, to reverse the judgment of that court on the ground that said judgment was erroneously rendered against the right of plaintiff claimed under Sections Nos. 5197 and 5198 of the Revised Statutes of the United States (Record, p. 33).

ARGUMENT.

Plaintiff's cause of action is so obscurely stated that it is difficult to ascertain exactly of what he complains. It is clearly enough alleged that he borrowed money from The Sioux National Bank of Sioux City, Iowa, the defendant, from time to time, up to March 1, 1890. It is not alleged directly or inferentially that any money was, at any time, voluntarily *paid* by plaintiff to the Bank. Usurious interest was included in the several notes and renewals. About February 24, 1890, plaintiff gave his note to the Bank for $10,000.00, which included usurious interest, and would have been due June 30, 1890. This note, it is alleged, "was a renewal of past and prior indebtedness of plaintiff and included, continued and contained *all* of the illegal and usurious interest charged prior thereto by defendant against the plaintiff" (Record, p. 10, par. 3). About March 4, 1890, plaintiff executed to the Bank a new note covering all his indebtedness, including the $10,000.00 note of February 24, 1890, and "the unlawful and usurious interest knowingly reserved and charged" prior to March 4, 1890 (Record, p. 10, par. 5).

In the first count of the amended petition it is alleged that this $28,000.00 note, embracing all the illegal interest which defendant had agreed to pay, was "put in a pretended judgment against plaintiff." The amount for which judgment was rendered does not appear. It is alleged that the "forfeited interest which has since *incurred* amounts in all to about nine thousand dollars" (Record, p. 11, par 9).

The second count of the amended petition sets forth the additional facts that a mortgage was given to secure

the note for $28,000.00; that on account of usury embraced in the note there was no interest legally due from plaintiff to the Bank. That before the principal became due and while the interest was, on account of its illegality, only due upon the face of the paper, the officers and attorneys of the Bank "delivered said note and mortgage to one J. W. White," who brought a suit to foreclose the mortgage on the sole ground of non-payment of interest. It is alleged that White and the officers and attorneys of the Bank, by a conspiracy, concealed from the court the fact that the note embraced usury, and obtained a judgment of foreclosure by sale of the mortgaged premises to satisfy a judgment for the full amount of the note, principal, usurious interest and attorney's fees (Record, p. 14, par. 8). It is alleged that under this judgment of foreclosure the mortgaged premises were sold and possession was taken by said White on or about May 31, 1894 (Record, p. 15, par. 11).

There is no allegation whatever as to the amount for which the premises were sold.

The mortgage is attached to, and made part of, the petition (Record, p. 10, par. 6), and in the mortgage it is provided that upon failure to pay interest "both principal and interest shall at once become due and collectible." (Record, p. 19, last par.)

The only relief demanded by plaintiff upon either count of his amended petition is a judgment for money, and an order permitting him to examine the books, etc., of the bank.

The most apparent claim of plaintiff upon either count of his petition is, that he has been injured by the judgment of a court of competent jurisdiction rendered upon a cause of action to which he had a legal defense. Why the defense was not interposed is not stated. That he had not full notice

of the action is not intimated. There is no hint that he was prevented in any way from asserting his full rights in the court when he was sued. If there was no service upon him, or any defect in the jurisdiction, the judgments are absolutely void and he can recover his land in a simple action of ejectment.

It is evident, however, that whatever wrong may have been done to plaintiff by reason of a judgment rendered against him by a court, either upon an insufficient cause of action, or by reason of the plaintiff in the wrongful action, concealing a defense that might have been interposed, no federal question is involved in such a wrong. If an independent suit can be maintained against a party under any circumstances, for obtaining and enforcing a judgment, it is clear that the cause of action is the fraud of such party practised upon the court. If the plaintiff, Daniel H. Talbot, is seeking judgment against The Sioux National Bank because it fraudulently procured the State Court to enter a judgment against Talbot upon a pretended cause of action, it is entirely immaterial what the pretense was that induced the court to act. A claim against a judgment creditor for *falsely pretending* that he had a good cause of action under the laws of the United States, or for *falsely concealing* that the judgment debtor had a good defense under such laws, raises no federal question under Section 709 of the Revised Statutes of the United States.

If plaintiff in error were in this court seeking to reverse the original judgment obtained against him by J. W. White, he would fail on the ground that this court can review the judgment of a state court only when the right, privilege or immunity claimed under the Constitution or any treaty or statute of the United States was specially

set up or claimed in the state court at the proper time and in the proper way.

Chappell vs. Bradshaw, 128 U. S., 132.
Leeper vs. Texas, 139 U. S., 462.
Spies vs. Illinois, 123 U. S., 131.
Re Buchanan, 158 U. S., 31.
Winona & St. Peters L. Co. vs. State of Minnesota, 159 U. S., 540.

This being so, it is clear that plaintiff raises no federal question by an action based upon the wrongful obtaining of a judgment which could not be directly reviewed in this court after affirmance by the highest court of the state.

Whatever may have been plaintiff's theory of his rights when he instituted his suit, it is now apparent that he claims the right to a judgment against The Sioux National Bank *directly* under Sections 5197 and 5198 of the Revised Statutes of the United States (Record, p. 33, Petition for Writ of Error). The sole question, therefore, is, does the amended petition of plaintiff state facts sufficient to entitle plaintiff to recover a judgment against defendant under the said sections? The Supreme Court of Iowa decided that the amended petition is not sufficient, and assigned one reason for its judgment. It is respectfully submitted that the judgment of the Supreme Court of Iowa is right for the reason assigned by the court and for two other equally valid reasons which might have been given.

First. Section 5197 of the Revised Statutes of the United States provides what interest may be lawfully taken or reserved by a National Bank and is as follows:

"Any association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of ex-

change, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, and no more, except that where by the laws of any State a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this Title. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days from which the note, bill, or other evidence of debt has to run. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.".

Section 5198 provides the remedy where usurious interest is taken, etc., and is as follows:

"The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same, provided such action is commenced within two years from the time the usurious transaction occurred."

The remedy provided by this Section is exclusive in all usurious transactions with National Banks. No state laws apply. It covers every form of the transaction, those in

which usury is promised and those in which it has been paid. The first clause provides a remedy where the usury is promised, either expressly or by reservation, at the time of discount. It applies only where the bank seeks to recover of the borrower, and can have no application to a suit by the borrower to recover of the bank.

Farmers and Merchants Nat. Bank vs. Dearing, 91 U. S., 32.

Brown vs. The Second Nat. Bank of Erie, 72 Pa. St., 209.

In the latter case, Judge Sharswood, after reciting the first clause, says, "this has evident reference to the enforcement of the contract by judicial process, in which case it is provided that it shall be held and adjudged that the bank shall forfeit the entire interest—that is, shall recover only the sum actually loaned or advanced without any interest at all. There is a marked difference in the language of the clause which follows and which makes provision for the case where the usury had been consummated by the actual receipt by the bank of the usury."

And in Barnet vs. Muncie Nat. Bank, 98 U. S., 855, Mr. Justice Swayne, referring to the last clause of Section 5198, says, "The remedy given by the statute for the wrong is a penal suit. To that the party aggrieved or his legal representative must resort. He can have redress in no other mode or form of procedure. The statute which gives the right prescribes the redress, and both provisions are alike obligatory on the parties."

Plaintiff's rights, therefore, must be enforced by the remedy prescribed by the last clause of Section 5198. It is made an express condition in this clause that the action shall be brought within two years. The language is, "provided such action is commenced within two years from the time the usurious transaction occurred." The amended

petition shows that the last dealing between plaintiff and the bank was on March 4, 1890, at which time the usurious note of $28,000.00 was given (Record, p. 12, par. 2). Judgment was rendered on said note May 6, 1891 (Record, p. 14, par. 8). The purchaser of the land, sold under the foreclosure judgment, took possession May 31, 1894 (Record, p. 15, par. 11). This terminated all the transactions until plaintiff filed his notice of intention to file his petition, August 29, 1896 (Record, p. 3). The petition was filed October 7, 1896.

It is obvious, therefore, that whatever the words "usurious transaction" may mean, the action was not commenced within two years from the time the usurious transaction occurred and fails by the very terms of the statute. For this reason the Supreme Court of Iowa said, "This action was begun October 7, 1896, and at that time the plaintiff's cause of action was barred, and the demurrer for that reason was properly sustained."

In his assignment of error, plaintiff seeks to evade the result of his laches by alleging that "it appears in said petition that the charges of illegal interest made against plaintiff in error by the defendant bank were made from time to time without his knowledge or consent that such transactions were fraudulently concealed from the plaintiff in error, and that knowledge of the same was not obtained by him until within two years prior to the commencement of the suit by the plaintiff in error" (Record, p. 34).

A careful reading of the petition fails to disclose any of these allegations, except that the interest was reserved and charged without the knowledge or consent of plaintiff. Even if plaintiff had alleged how the usurious transactions were fraudulently concealed from him (a state of facts difficult to imagine) and how and when they were discovered

by him, it would not affect the terms of a penal statute prescribing the time within which suit must be brought. If moneys were fraudulently obtained from plaintiff by the bank, whether usury or not, an action for recovery would lie. But when plaintiff seeks the special remedy of a penal statute, he must comply with its conditions.

Secondly, it does not appear that any usury was ever, directly or indirectly, paid by plaintiff to the bank. The petition shows that usury was reserved in the note; that the note was secured by mortgage, and that by foreclosure of the mortgage the property embraced therein was sold to pay the note. Neither the value of the land nor the amount for which it was sold is stated. From no allegations can it be inferred that the note was paid in full. While it appears that foreclosure suit was brought solely on the ground of non-payment of interest, yet by the terms of the mortgage the principal sum became due when the interest was not paid and judgment was in fact rendered for the full amount of the note, principal and interest. The most that can be claimed for plaintiff is, that, as the entire interest was forfeited, and the principal not therefore due, judgment was rendered for the principal debt before its maturity. It may be conceded that this would have been error if plaintiff had interposed usury as a defense. Nevertheless, when the land was sold for the payment of the judgment, the proceeds were legally applicable to the payment of the valid part of the debt, the principal, and not to the illegal part, the interest, and it must be presumed that the proceeds were so applied. It is conceded that there was a just debt amounting to $14,874.60 (Record, p. 12, par. 2), for which judgment was, in fact, rendered. Suppose the land was sold for $10,000.00 (a supposition entirely consistent with the al-

legations of the petition) and so much of the principal of the debt was extinguished, what wrong has plaintiff suffered?

The principle of law is well settled that when a general payment is made upon a note embracing usury, the payment is applied to the extinguishment of the principal of the debt rather than to the payment of the illegal interest.

McBroom vs. Scottish Mortgage and Land Investment Co., 153 U. S., 318.
Stevens vs. Lincoln, 7 Met. (Mass.) 525, 528.
Saunders vs. Lambert, 7 Gray, 484, 486.
Harvey vs. Insurance Co., 60 Vt., 209.
Kendall vs. Crouch, 88 Ky., 199, 202.
Smith vs. Robinson, 10 Allen, 132.
Hawkins, vs. Welch, 8 Mo., 490, 492.
Hale vs. Bank, 30 Neb., 99, 102.
Jackson vs. Garner, 79 Ga., 415.
Wright vs. Laing, 3 Barn. & Cres., 165, 168.
Bank of Cadiz vs. Slemmons, 34 Ohio St., 142.

A corollary of this proposition is, that the lender is not liable to an action for the penalty prescribed by statute for taking usurious interest so long as the principal debt, after deducting all payments, remains unpaid.

Before plaintiff can claim the penalty for usury *paid*, when he relies upon a general payment, he must show that such payment was more than sufficient to extinguish the valid part of the debt.

In the case of McBroom vs. Scottish Mortgage and Land Investment Co., 153 U. S., 318, a statute of New Mexico, similar to the National Banking Act, received consideration by this court. The only material difference

between the statutes is that the statute of New Mexico declares only the *excess* of legal interest forfeited instead of the whole interest. The suit was one to recover the penalty for usury paid. Several usurious notes were given for the interest, separately from the principal note. One of the usurious notes had been paid in full. Mr. Justice Harlan, delivering the opinion of the court, says, p. 328, "The borrower has no cause of action until usurious interest has been actually collected or received from him. Such is the mandate of the statute. And interest can not be said to have been collected or received in excess of what may be lawfully collected and received until the lender has in fact, after giving credit for all payments, collected or received more than the sum loaned, with legal interest." Omitting the last three words of the quotation (applicable to the New Mexico Statute alone, on account of the difference above mentioned) the authority is exactly in point.

In Stevens vs. Lincoln, 7 Metc., 525, the court said, "And, in the absence of proof as to any appropriation of a partial payment, the law will apply a payment to the valid demand rather than to the illegal one; and the balance which remains unpaid, if it exceeds the usury agreed to be paid, includes the usury, so that, on one side, the debtor shall not recover back any part of that which he honestly owed, by the allegation on his part that the payment made by him was the payment of the usury, nor on the other hand will the law permit the creditor to secure to himself the avails of his illegal contract, and, when he sues for the balance due on the contract, to aver that the usurious interest was contained in the previous payment, and that the residue is justly due."

The judgment of the Supreme Court of Iowa, affirming the judgment below was, therefore, correct for the additional reason that the petition fails to show that any usury was paid.

Thirdly, the plaintiff is estopped to allege that the note for $28,000.00 embraced usury by the very judgment of which he complains. If the note embraced usury it was valid only for the amount of the principal without interest. The court adjudged that the full amount of the note, principal and interest, was due. The petition does not allege whether or not usury was pleaded as a defense, but that is not material. The fact that the whole amount was legally due is conclusively established by the judgment, which can not be collaterally attacked.

In Hopkins vs. West, 83 Pa. St., 109, the lender had obtained judgment against the borrower upon a note, including usurious interest. The borrower paid the judgment and sued to recover the usury. Mr. Justice Sharswood, delivering the opinion of the court, says, page 110, "There is no difference in legal effect between a judgment confessed, or for want of appearance or plea, and a judgment on the verdict of a jury. * * * No substantial difference can be shown between this (usury) and any other illegality entering into its consideration. The judgment in favor of Hopkins, Wright & Co. against West would, no doubt, have been opened upon his application, and the excess beyond legal interest would have been stricken from it. But standing as it did upon the record and paid by West in full, he can not be permitted now to go behind it and claim that part of it was not due, either from usury or any other cause."

This case is followed and approved in Montagu vs. McDowell, 99 Pa. St., 265, and the same principle is held in Kearney vs. First National Bank, 129 Pa. St., 577.

In Heath vs. Frackleton, 20 Wisc., 338, where the judgment debtor brought a suit to recover the usury collected by foreclosure and sale of premises, it was held that

the judgment was a bar. Mr. Chief Justice Dixon says, p. 340, "It is an elementary principle that every such judgment, unless impeached for fraud, is so far absolutely conclusive upon the parties to it. To maintain this action, the plaintiff must go behind the judgment and show that the whole sum for which it was rendered was not due and owing, and also that the notes and mortgage as to the sum of $1,000 and all the interest, purporting to have been secured by them, were void for usury. No plainer case within the rules of estoppel by judgment can be imagined."

In Steward vs. Downer, 8 Vt., 320, which was an action by an informer to recover a statutory penalty for usury, the payment of which had been enforced by a foreclosure sale, the court held that there could be no recovery when the payment was by operation of law; also that the judgment was *res judicata* as to usury. On the latter point, Judge Redfield says, "This decree is to all intents a judgment, and as between the parties to the judgment, every defense as to the original suit is forever put at rest. The validity of the judgment can not be again examined. The usury is as effectually purged as if the parties had by agreement deducted the excess of interest from the security, which has always been held to purge the usury."

Section 5198 gives a right to the borrower to repudiate the entire interest when it is tainted with usury. No matter how many promises to pay have been executed by renewal notes such promises are not payments. He has a valid *defense* to the whole of the last renewal note, excepting to the extent of the original sum borrowed without interest.

Brown vs. Marion Nat. Bank, 169 U. S., 416.

From *payment* by the borrower an entirely different right arises under Section 5198—the right to the penalty

if suit is brought within two years from the payment. The statute does not give the borrower an option *either* to plead usury as a defense, *or* to permit the principal and interest to be collected by judgment and execution, and then to sue for the penalty. Obviously when the statute gives a penalty for interest "paid" it means voluntarily paid. It can not mean interest collected by a suit at law in which the validity of the note, that is to say, whether it embraces usury or not, is the very matter in issue between the parties. Such a construction would encourage litigation. It would encourage the borrower not to interpose usury as a defense, but to permit judgment to be entered and collected, and then to bring suit to recover twice as much as he would have saved by a defense. This is not a reasonable construction of a penal statute. "Paid" means voluntarily paid, not collected by law.

Steward vs. Downer, 8 Vt., 320.

For the additional reason, therefore, that plaintiff is estopped by the judgment he has pleaded to allege that the note on which the judgment was founded, embraced usury, the judgment of the Supreme Court of Iowa should be affirmed.

There is high authority for the proposition that a borrower from a national bank can not maintain an action under Section 5198 to recover a penalty for usury until he has paid, or offered to pay, what he rightfully owes.

Hazeltine vs. Central Nat. Bank, 155 Mo. 66.

It is unnecessary for us to contend for so broad a principle, but it is certainly inequitable to permit a borrower

who has paid nothing, and who has been adjudged by a court of competent jurisdiction to owe a certain amount part only of which has been collected, to maintain a suit for a penalty without showing that any part of the obligation which he admits to be valid, has been satisfied.

Respectfully submitted,

FRANCIS F. OLDHAM,

Attorney for Jonathan W. Brown,
Receiver of The Sioux National
Bank of Sioux City, Iowa.

August 1, 1901.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1901.

NO. 190.

DANIEL H. TALBOT,
PLAINTIFF IN ERROR,
vs.
SIOUX NATIONAL BANK, OF SIOUX CITY, IOWA,
DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Iowa.

Brief of Associate Counsel for Defendant in Error.

STATEMENT.

What the Plaintiff in Error Claims.

Plaintiff in error restates his entire claim in count second of his amendment to petition. (Record, pp. 12-15.)

He states that in March 1890, he delivered to the defend

ant his note for $28,000, and alleges that said note included an actual indebtedness of $14,874.60, and that the remainder, $13,125.40, represented interest, which he terms "unlawful and forfeited interest" by virtue of offending against sections 5197 and 5198 of the Revised Statutes of the United States.

He further alleges that said $28,000 note was secured by a mortgage upon certain real estate of the plaintiff in error situated in Plymouth County, Iowa, which mortgage was duly recorded on March 5, 1890. He alleges that the fact that there was usurious interest reserved in said $28,000 note was known to the defendant, its officers, attorneys and to J. W. White, the actual holder of said note.

He alleges that the principal debt was not due except under the provision maturing the principal upon default in interest, and contends that said sections of the federal statutes forfeited the interest and rendered the principal "non-interest bearing," and, therefore, that default in the usurious interest could not be made the basis for maturing the principal indebtedness. He alleges that the court had no jurisdiction to try and hear said suit or render decree therein for the reason that whatever valid indebtedness there was had not matured, and alleges further that the defendant was guilty with said White, the holder of the mortgage, in concealing this alleged usury from the court, but does not allege that it was concealed from himself.

He alleges that without his knowledge or consent there was more than $1.00 of usurious interest included in the renewal notes, that were assembled in this $28,000 note, but does not allege that he was without knowledge of all reservations of usury therein. Evidently he did not set up in the state court a de-

fense under the first clause of section 5198 and seek thereby to limit the recovery to the actual amount of money loaned, exclusive of all interest, as he was entitled to do under this federal statute if his defense of usury had been maintained. Or if he did, his defense was not sustained by the court. He was made a party to the foreclosure suit, and it may be inferred that he chose to let the judgment go for the full amount of the indebtedness with interest rather than attempt to take advantage of the first clause of section 5198, possibly under the idea that he would be able to recover back under the second clause at a later time twice the amount of interest actually included in the judgment, greatly to his profit.

He further alleges that judgment in said foreclosure proceedings was rendered on the 6th day of May, 1891, in said state court for $31,086.50, which he alleges included said "forfeited interest," a term used by him to designate all interest upon the actual principal loaned. He then alleges that "said lands were afterwards sold on said execution to satisfy said judgment" and were bid in by one of the directors of said bank, and that the sheriff's deeds under said foreclosure sale have been duly recorded in Plymouth County, Iowa, in the manner required by law. It does not appear in the allegations of plaintiff in error that the property sold for enough to satisfy *in full* the said judgment or even to satisfy the same to the extent of $14,874.60, which is admitted to have been a valid principal indebtedness, exclusive of all interest. Unless this paragraph 8 (p. 14) is construed to involve a satisfaction of the usurious part of the judgment the plaintiff in error has made no pretense of payment of any usurious interest.

In paragraph 9 he alleges that the state court was imposed upon in including "forfeited interest" in the decree, and that the decree should have been for no more than the principal indebtedness exclusive of all interest.

He further alleges that said principal indebtedness had lost its "interest-bearing power" by reason of usury being reserved in said $28,000 note, and, therefore, the indebtedness had not in fact become due, and "said judgment, decree of foreclosure, the issuance of the execution on said judgment, and the making of the sheriff's deed aforesaid, were and are illegal and void." We presume he means that the judgment should not have included this "forfeited interest," and, further, that it should not have been rendered at that time because the "forfeited interest" provisions were not sufficient to mature the original indebtedness. If he means that all these proceedings are to be considered by this court as "illegal and void," it would be difficult to see just how he has been hurt thereby.

In the next paragraph he alleges that the holder of the note and mortgage and the defendant in error without the knowledge or consent of the plaintiff in error took forcible and wrongful possession on or about May 31, 1894, of the said real estate, and has held such possession ever since causing the plaintiff in error to "sustain damages by being deprived of the use and occupation and benefits of said premises and the reserving and charging of the unlawful and usurious interest heretofore mentioned in the approximate sum of $31,000." Unless he means that this possession was taken under the authority of the sheriff's deed in the foreclosure proceedings, we do not discover its pertinency to this action.

He finally demands judgment for twice $13,125.40 "as a penalty provided for by sections 5197 and 5198, Revised Statutes of the United States, together with the interest thereon."

To sum up the indefinite claim of the plaintiff in error, we state that it seems clear enough that he is endeavoring to gain something under the second clause of section 5198, being the punishment clause for the *payment* of usury. He nowhere alleges payment of any usury. He does not even allege that the defendant in error collected on execution sale the judgment in foreclosure in an amount that would reimburse it for even the original and admitted principal indebtedness, exclusive of all interest. Unless the court shall interpret the allegations of the defendant in error to mean that under, by and through the foreclosure sale of the real estate the defendant in error was enabled to collect that part of the judgment which the plaintiff in error asserts was for "forfeited interest," we do not see where a plausible claim can be made by the plaintiff in error to the effect that he has ever *actually paid* one cent of usury.

The last dealing between plaintiff and the bank was the giving of the $28,000 note and mortgage on March 4, 1890, (p. 12, par. 2). The suit to foreclose this note and mortgage was begun April 9, 1891 (p. 13, par. 7). Decree in foreclosure was rendered on May 6, 1891 (p. 14, par. 8). Execution was taken out, a sale made and sheriff's deed delivered. Possession was taken on May 31, 1894 (p.15, par. 11). The original notice was served herein on August 26, 1896, and the petition filed on October 7, 1896. The exact dates of the sale and of the sheriff's deed are not given. From the Iowa statutes, set out in brief of associate counsel for defendant on motion to dismiss or affirm,

it is manifest that the sale took place more than three years prior to the commencement of this action. The lower state court sustained the bank's demurrer to the petition on many grounds and the supreme court construed the action as one to recover the penalties under the second clause of section 5198 and found *as a fact* that the usurious transaction, if any, occurred "more than two years prior to the commencement of this action," and that, therefore, this action was barred by the very terms of section 5198 itself.

ARGUMENT.

I.

No Federal Question is Presented.

This proposition was argued in the brief of associate counsel filed herein on January 3, 1901, on motion to dismiss or affirm, and we now make that brief a part of this argument by this reference thereto, citing one additional case:

Avery vs. Popper, 179 U. S., 315.

II.

The Judgment of the State Court is Right.

The supreme court of Iowa drew from the pleadings of plaintiff in error, interpreted in the light of the law, practice and procedure of Iowa, the conclusion of *fact* that the alleged usurious transaction, if any, occurred "more than two years prior to the commencement of this action," and therefore held

" this action was begun October 7, 1896, and at that time the plaintiff's cause of action was barred."

Counsel for plaintiff in erorr in their brief (p. 6) on motion to dismiss or affirm admit that "the payment of this note was secured by a real estate mortgage under which foreclosure proceedings were subsequently had, and a judgment in foreclosure entered *resulting in a sale of the lands and the taking possession thereof by the bank on or about May 31, 1894.*"

Section 4055 of the Code of Iowa gives the mortgagee the right of possession during the one year of redemption from the day of sale, after which the purchaser at the sale (section 4054) "will hold the property absolutely." Section 4062 provides that the sheriff's deed issue only at the end of one year after the sale. These sections are quoted in full in our brief on the motion to dismiss. It follows, therefore, that possession could not have been taken by the purchaser until the expiration of the year of redemption, and it follows that possession having been taken under said sale on May 31, 1894, the sale itself must have been at least as early as May 31, 1893. At any rate, the usurious transaction, if any, had occurred as early as the admitted date of taking possession, to-wit: May 31, 1894, which is more than two years prior to the commencement of this action. Indeed, this matter is placed beyond contention by the further admissions of opposing counsel in their brief on the motion (p. 3) in the following language: "That thereafter (meaning after the decree in foreclosure, May 6, 1891) the said lands were sold to satisfy said judgment, and on or about May 31, 1894, the same were taken possession of by defendant and one White," an ad-

mission that the sale took place prior to May 31, 1894, as found by the supreme court of Iowa. (Record, p. 32.)

In our brief on motion to dismiss or affirm, the Iowa law is set out and shows that a proper interpretation of the allegations of the petition conclusively establishes the correctness of the judgment of the state court. This court should reach the same conclusion, if indeed, it is not bound thereby.

Abraham & Son vs. Casey, 179 U. S., 218.

III.

United States Rev. Stat. Sec. 5198 in its second clause creates an entirely new liability of a penal nature with the right to an action for its enforcement, "Provided such action is commenced within two years from the time the usurious transaction occurred," and this special limitation acts directly upon the penal liability as well as upon the remedy therefor.

This section 5198 contemplates two distinct classes of actions: *First*, those wherein usurious interest "has been *agreed to be paid* thereon;" *second*, those wherein usurious interest "has been *paid.*"

The plaintiff in erorr seeks no relief under the first clause of said section, but manifestly limits himself to his right, if any, to relief under the second clause of said section. Usurious interest is not "paid" merely because it is included from time to time in renewal notes. Such renewal notes would involve only

the *promise* of usurious interest. The second clause contemplates *actual payment*, which alone can be made the basis of an action to "recover back * * * twice the amount of interest thus paid."

Haseltine vs Central Nat'l Bank, 183 U. S.

National Bank vs. Ragland, 181 U. S., 45.

The time within which the action must be brought operates as a limitation of the liability itself as created and not of the remedy alone. It is a condition attached to the very right to sue. Time is made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statute, and the limitation of the remedy is to be treated also as a limitation of the right.

The penalties of this statute are lost at the expiration of the two-year period, and cannot be prolonged by undiscovered or concealed fraud.

This penality for usurious interest paid is created anew and solely by this statute, which contains its own special limitation. Time is of the essence of the right created and the limitation is an inherent part of the statute so that there is no right of action independent of the limitation. Such special limitation extinguishes the right absolutely in two years. Analogous cases may be cited:

The Harrisburg vs. Rickard, 119 U. S., 199, 214.

"A wide distinction exists between pure statutes of limitation and special statutory limitations qualifying a given right. In the latter instance time is made an essence of the right created and the limtation is an inherent part of the statute or agreement out of which the right in question arises, so that there is no right

of action whatever independent of the limitation. A lapse of the statutory period operates, therefore, to extinguish the right altogether. To such limitations the rules of law governing pure statutes of limitation, applicable to all classes of actions, have no application.

"Where time is of the essence of the right created, and the limitation is an inherent part of the statute or agreement under which the right in question arises, so that there is no right of action independent of the limitation, such special limitation extinguishes the right rather than affects the remedy."

19 Am. & Eng. Ency. of Law, pp. 150-151,

citing the following cases:

Bartlett vs. Manor, 146 Ind., 621.

The Harrisburg, 119 U. S., 199.

Finnell vs. Southern Kansas R. Co., 33 Fed. Rep., 427.

Hudson vs. Bishop, 35 Fed. Rep., 820.

Spicer vs. Hockman, 72 Ind., 120.

Potts vs. Felton, 70 Ind., 166.

Taylor vs. Cranberry Iron, etc., Co., 94 N. C., 525.

Smith vs. Tripp, 14 R. I., 112.

See also:

Palen vs. Johnson, 50 N. Y., 49 (a usury case).

Savings & Trust Co. vs. Bear Valley Irr. Co., 89 Fed. Rep., 38.

A., T. & S. F. R. R. Co. vs. Tanner, 19 Colo., 564; 36 Pac. Rep., 541, 543.

Goodwin vs. Cunningham, 54 Neb., 16; 74 N. W. R., 316.

Lambert vs. Ensign Mfg. Co., 42 W. Va., 817; 26 S. E. R., 431-2.

McCartney vs. Potomac Elec. Co., 94 Va., 203; 26 S. E. R., 421.

Hoover vs. Ry. Co., 46 W. Va., 270; 33 S. E. R., 224.

IV.

The two year period of this statute cannot be extended by any engrafted qualification for fraud concealed or newly discovered.

Referring to such special statutory limitations qualifying a given right, the law is thus stated:

"They are not subject to the disabilities and excuses through which the effect of ordinary statutes of limitation may be avoided, nor, it seems, can they be evaded even by proof of fraud."

19 Am. & Eng. Ency. of Law, p. 151.
Taylor vs. Coal Co., 94 N. C., 525.
Suggs vs. Ins. Co., 71 Texas, 579; 9 S. W. R., 676.
Cochran vs. Young, 104 Pa. St., 333.
Luther vs. Luther, 122 Ill., 558; 13 N. E. R., 166.
Spicer vs. Hockman, 72 Ind., 120.
Potts vs. Fulton, 70 Ind., 166.

The plaintiff in error invokes a penal statute, and must bring himself clearly within the provisions thereof. Admittedly he has failed to do this. In their brief on motion to dismiss or affirm, counsel for plaintiff in error seek to engraft upon this penal statute a qualification that fraudulent concealment will prevent the running of the statute until the discovery of the

fraud. Defendant in error denies the right to engraft such a qualification upon this penal statute. This is not a general statute of limitation. There was no such penal liability at common law. This statute creates a new legal liability, which liability itself as created expires by the express limitation of this penal statute. The liability and the remedy are created by the same penal statute, and the expiration of two years forfeits this new legal right. The limitation is a condition attached to the liability itself. In said brief counsel for plaintiff in error concede (p. 7) that this action was not brought within two years from the time the usurious transaction occurred, and the supreme court of Iowa expressly so found, but counsel further seek to evade this limitation by the further contention that the two years should not commence to run until Talbot actually discovered the alleged usury. But if this statute is not a general statute of limitation but rather a penal statute calling for strict construction, and if time is of the essence of the newly created right as well as of the remedy, then the right ends in two years and the remedy cannot be prolonged by any engrafted qualification. The very statute that creates this new penalty fixes its duration, and the court should not continue the period of this penalty beyond the terms of this penal statute.

The Harrisburg vs. Rickard, 119 U. S., 199, 214.

Newburn vs. Bass, 82 Ala., 622, 2 So. Rep., 520.

See also cases cited *supra.*

Counsel for plaintiff in error in their brief on motion to dismiss or affirm seem to regard this as a general statute of limitation, and cite only one case, Pearsall vs. Smith, 149 U. S., 236, which has no application to the penal statute under con-

sideration, for the reason that the second clause of section 5198 is not a statute of limitation of the remedy alone, but a limitation of the penal liability itself thereby created. It avails nothing to extend a remedy if the liability has expired.

V.

Even if the position of counsel for plaintiff in error were correct, plaintiff in error could avail himself only of concealment by the defendant in error without fault or negligence or laches on the part of the plaintiff in error.

Plaintiff in error was a party to the foreclosure suit, and must be presumed to have followed that suit with notice of each successive step taken therein, including the sale, deed and the assumption of possession thereunder, because these are the ordinary and usual steps in foreclosure proceedings. At any rate having been properly brought into court in the foreclosure proceedings, the plaintiff in error as against collateral attack will be held estopped under the doctrine of laches from saying that he did not have knowledge of or that the defendant concealed from him those completing steps in the foreclosure proceedings that were ordinary, natural, timely and necessary in making the foreclosure itself effective. These steps were to be expected. The decree should be conclusive upon the plaintiff in error who should not now be permitted to invoke his own laches as a basis for this action. There is no allegation that defendant concealed plaintiff's cause of action.

Pearsall vs. Smith, 149 U. S., 236.

It seems to be the law that usury is as effectually purged by judgment as by a remission of all tainted interest prior to judgment, at least as against a collateral attack.

Stewart vs. Downer, 8 Vt., 320.

VI.

The allegations of plaintiff in error touching fraudulent concealment are only conclusions of law instead of statements of ultimate facts, and, therefore, cannot avail the plaintiff in error.

Surely it is not within the proper scope of this action to set aside the judgment of foreclosure for any fraud alleged to have been practiced upon the court by the plaintiff therein whether abetted by the defendant in error or not. Such is not only not a federal question, but is not a question of any kind upon the record that any court has ever been asked to decide. We may say that in a suit for relief against a judgment containing usury the debtor would probably be compelled to repay the legal debt as a condition of any relief. Plaintiff in error offers no excuse for not discovering the fraud sooner if, indeed, he does not admit knowledge of some usury from the beginning. He states no facts. On demurrer, statements of legal conclusions cannot avail. 12 Ency. Pldg & Prac., p. 1030, and following.

VII.

Plaintiff in error does not allege that he actually paid any usurious interest.

Section 5198 does not contemplate that the debtor may be a

party to the foreclosure proceedings and silently permit such proceedings to go into judgment for principal and interest, and then claim that the amount bid at the execution sale was larger than the original principal, exclusive of all interest, and, therefore, that under and by the execution sale itself he has paid usurious interest. The statute does not contemplate that a party to the foreclosure proceedings, decree and sale can forego his defense of usury therein and more than two years later collaterally assail the foreclosure sale itself as a usurious transaction through which he paid usurious interest. Such a contention regards not the solemnity of court proceedings culminating in decree, execution, sale and deed. The judgment of a competent court with or without the defense of usury, unappealed from and not directly assailed, should estop the plaintiff in error from claiming that the execution of that judgment resulted in the payment of usurious interest. This action is not available to the plaintiff in error to set aside that decree, and in the absence of some proper proceedings to set aside that decree in foreclosure, the collection thereof should not be held an offense against any federal statute. Money collected on such a decree is not money "paid" for the purpose of a collateral attack under the penal statute under consideration.

Steward vs. Downer, 8 Vt., 324.

VIII.

While the allegations of plaintiff in error show a decree in foreclosure, sale, execution, deed and assumption of possession thereunder, they do not show that there has been "paid" on the

decree an amount in excess of the admittedly valid principal indebtedness exclusive of all interest. There is no presumption that the bid exhausted the judgment. If the taking of any interest offended a statute of usury, then the bid should be applied upon the valid principal until at least that principal was paid out, and there is no showing that the property was worth or sold for an amount sufficient to pay out the admittedly valid original indebtedness, exclusive of any interest, legal or illegal.

McBroom vs. Scottish Mortgage & Land Investment Company, 153 U. S., 318.

IX.

The decree in foreclosure cannot be thus collaterally assailed.

The plaintiff in error had his day in court in the foreclosure suit. The decree of the court in that suit to which he was a party should be held an estoppel against his assertions in this action. Until he has by proper steps set aside that decree he is not in a position to avail himself of contentions in this action which indirectly destroy the integrity of that decree. Plaintiff in error relies much on Brown vs. Marion Nat'l Bank, 169 U. S. 416. Whatever that case might have availed the plaintiff in error in the foreclosure proceedings in the state court under proper issues has now become immaterial. That case arose under the first clause of section 5198—an agreement to pay usurious interest—and may be given full force without making it applicable to the second clause of said section. The *Brown* case is, however, an authority for the proposition that interest is not

"paid" merely because included in a renewal note and that the lender cannot avail himself of the second clause of said section as having paid usurious interest merely on allegations of the including of usurious interest in renewal notes, and for the further proposition that the word "paid" in section 5198 refers to interest "actually paid."

Haseltine vs. Central Nat'l Bank, 183 U. S.

X.

Plaintiff alleges that all foreclosure proceedings are void.

Plaintiff in error (pp. 14-5) alleges that the foreclosure and decree and all proceedings thereunder "were and are illegal and void." If this allegation is given credit, then such void proceedings not only do not amount to payment of usurious interest but also do the plaintiff in error no harm and the demurrer was rightly decided.

We submit that under the record of this action the writ of error should be dismissed for want of jurisdiction or the judgment of the supreme court of Iowa should be affirmed.

Respectfully submitted,

ASA F. CALL,
HENRY J. TAYLOR,
Associate Counsel for Defendant in Error.

Supreme Court of the United States.

No. 190.—October Term, 1901.

Daniel H. Talbot, Plaintiff in Error,
vs.
The Sioux National Bank of Sioux City, Iowa.
} In error to the Supreme Court of the State of Iowa.

[April 14, 1902.]

This is an action brought in the District Court of Woodbury County, Iowa, under sections 5197 and 5198 of the Revised Statutes of the United States, relating to national banks, to recover the sum of $16,250, the amount of interest alleged to have been unlawfully charged and collected by the defendant bank.

The original petition alleged as follows:

"The plaintiff claims of the defendants, and each of them, the sum of $16,000, as money justly due plaintiff from defendants, on account of unlawful and usurious interest, knowingly and unlawfully taken from the plaintiff within the seven years last past.

"The plaintiff further alleges that during said time he had various and numerous business transactions with the defendant bank; in all said transactions defendant charged and exacted a greater rate of interest for the use of moneys had and received by plaintiff from the defendants than the law recognizes or permits a national bank to charge for the use of money."

The petition also alleged that the books and accounts wherein said transactions were kept were in the possession of the defendant, and "that the plaintiff has no itemized statement of the account between him and the defendant," and that, therefore, he was unable to incorporate in the petition a statement of the accounts or bill of particulars.

The petition also alleged that there was due plaintiff the sum of $250, deposited by him with the defendant, which had never been drawn out or paid to him.

Upon demurrer to the petition the court ordered it to be more specific, "so far as to require the plaintiff to state his cause of action for usury in one count, and also to state his cause of action for a deposit in a separate count, and also to state the amount claimed as usury that was paid within two years next prior to the commencement of this cause of action." The petition was thereupon amended.

We are only concerned with the first and second counts, which alleged the usury. It was alleged in the first count that on or about the 27th of May, 1889, the plaintiff commenced doing business with the bank in the ordinary way between the bank and its patrons, and continued to so do

business with it until it closed its doors on or about the 27th of August, 1896. That during that time the bank knowingly charged him with a greater rate of interest than allowed by the laws of Iowa, which amounted to more than one dollar, but the exact amount of which he was unable to state, because the books containing the transactions were in the possession of the bank.

That on the 24th of February, 1890, the bank added the amount of usurious interest charged by it to the legitimate indebtedness of plaintiff, and included both and the sum of $2,000 advanced to plaintiff, making a total of $10,000, in a promissory note bearing interest at the rate of ten per cent per annum, and as collateral security for said note plaintiff assigned to the bank all of his equity in eighty-one contracts, covering 3,290.57 acres of land in Plymouth County, Iowa.

That on the 4th of March, 1890, plaintiff executed to the bank a non-negotiatable promissory note for $28,000, to cover all of his indebtedness to the bank, to wit, "fourteen thousand five hundred dollars, in a draft, to pay on certain railroad lands; the ten thousand dollar note herein mentioned before, and the unlawful and usurious interest knowingly reserved and charged prior thereto, and continued in said ten thousand dollar note aforesaid and continued and renewed in the twenty-eight thousand dollar note."

To secure said note plaintiff executed a mortgage of the land aforesaid.

"That the above note and mortgage, which were made upon the 4th day of March, 1890, did include the $10,000 illegal and unearned note, and interest to the amount of $17.10; and which said note and mortgage were made to date back and to bear date of March 1, 1890, thereby increasing the rate of interest on the $10,000 note to about 14 per cent per annum; and which said illegal, unlawful and usurious interest was knowingly reserved and charged by the defendant and included in and is a part of the $28,000 note aforesaid.

* * * * * *

"That the unlawful and usurious interest knowingly reserved and charged by said defendant bank against the plaintiff herein, together with the interest which in law and in fact was and is forfeited, but was unlawfully and wrongfully put in a pretended judgment against plaintiff herein in a certain case entitled *J. W. White* v. *D. H. Talbot et al.*, in the District Court of Plymouth County, Iowa, and the forfeited interest which has since accrued, amounts in all to about nine thousand dollars; the exact amount plaintiff cannot state for the reason the accounts, books, papers and records of said business between plaintiff and defendant bank is in the custody and possession of said defendant and to which plaintiff has no access; and which amount of nine thousand dollars is due and owing to the plaintiff from the defendant."

The second count alleged the transactions between the plaintiff and the bank, substantially as in the first count, though in somewhat different order and form, and not so much in detail, and that the charges and reser-

vations of usurious interest and its additions and continuations through the various forms of his indebtedness were without his knowledge or consent.

That the bank without the knowledge or consent of plaintiff delivered the $28,000 note and the mortgage which was executed to secure the same, to one J. W. White, a stockholder in the bank, "who afterwards unlawfully and before said note was due and payable, commenced a foreclosure proceedings in the District Court of Plymouth County, Iowa."

That said White with certain officers of the bank "did conspire with a view to the bringing about a foreclosure, and by this means adjudicate the liabilities which they would bear under the provisions of section 5329, Revised Statutes, because of the knowingly reserving and charging of unlawful and illegal interest as heretofore set out in this amended petition. And that said interested parties as officers or agents of the said bank, unlawfully and with the intent to impose upon the court, by fraudulent representations to the honorable judge of the District Court in Plymouth County, Iowa, set out in their petition for said foreclosure the right and justice of foreclosure upon the sole ground of non-payment of interest, which interest they, individually and collectively, had full knowledge of having been reserved and charged, and of which the defendant in said proceedings was without knowledge at that time, and the said interest was forfeited under the provisions of sections 5197 and 5198 of the Revised Statutes.

"Par. 6. That the said J. W. White, in pursuance of the conspiracy formed with the said A. S. Garretson and W. L. Joy as aforesaid, and for the purpose of misleading and deceiving said District Court and causing it to assume jurisdiction in said case, wrongfully and unlawfully suppressed the fact that said twenty-eight-thousand-dollar note contained unlawful and usurious interest, and that all of the interest in said note and the indebtedness of the plaintiff to defendant and said Garretson had been forfeited, and suppressed the fact that said note had lost its interest-bearing power and was not due, and that no right of action then existed, and suppressed the fact that the court had no jurisdiction to try or hear said cause or render judgement therein.

"Par. 7. The plaintiff further states that on or about the 9th day of April, 1891, the said J. W. White, A. S. Garretson, W. L. Joy and the firm of Joy, Hudson, Call & Joy, and the defendant bank, did wrongfully and unlawfully combine, conspire and confederate together to and did cause an action to be commenced and proceedings to be instituted against the plaintiff herein, and the land described in said Exhibit 'B,' in the District Court of Plymouth County, Iowa, in the name of said J. W. White, instead of the name of the defendant herein, The Sioux National Bank, the real party in interest. That said action was so commenced in the name of said J. W. White for the purpose of avoiding and evading the force and effect of the sections of the Revised Statutes of the United States herebefore set forth and referred to in this amendment."

That on the 6th of May, 1891, judgment was obtained in the foreclosure suit for the sum of $31,086.50, which included "the unlawful and usurious interest and the forfeited interest." The land mortgaged was sold "on

special execution" to satisfy the judgment, and, except three forty-acre pieces, was purchased by C. L. Joy, a director of the bank, for White. Sheriff's deeds were subsequently executed to the purchasers and recorded in Plymouth County.

That the court in the foreclosure suit relied on the statements of counsel and the allegation of the petition, and did not know that usurious interest was charged, and, "deceived and misled by the fraud practiced upon it," rendered judgment "for the sum of $13,125.40, more than would be actually due at maturity of said note and mortgage, to wit, March 1, 1895."

That the District Court of Plymouth County did not have jurisdiction of plaintiff or the lands mortgaged because by reason of the circumstances set out, and that the note was not due, and the judgment, decree and the the execution were void.

That the said White and the defendant bank on or about the 31st of May, 1894, took possession of the lands and property described in the mortgage, and has forcibly held possession ever since.

The defendant demurred to the petition, and stated as grounds of demurrer to the first count, among others, that it did not appear that any usurious interest had been paid by plaintiff, and that it did not state a cause of action within the provisions of sections 5197 and 5198 of the Revised Statutes of the United States. As grounds of demurrer to the second count it was stated: "1st. That said action is barred by the limitations prescribed in section 5198, Revised Statutes of the United States, under which said action purports to be brought."

The demurrer was sustained, and the plaintiff, not pleading further, the action was dismissed. The Supreme Court of the State affirmed the judgment. Thereupon this writ of error was allowed.

The Supreme Court of the State, passing on the case, said:

"The defendant demurred to the two counts of the petition alleging the cause of action herein stated. Several grounds were stated in the demurrer, among others, that the statute of limitations had run against the plaintiff's claim. The demurrer was sustained generally, and, the plaintiff electing to stand on his pleadings, the cause as to the claim made in counts one and two of the petition was dismissed.

"The twenty-eight thousand dollar note was never paid by the plaintiff. A land mortgage was given to secure it, and that was foreclosed in Plymouth County, Iowa, and a decree rendered against the plaintiff thereon May 6, 1891. The land covered by this mortgage was sold some time thereafter, just when does not certainly appear, but it was more than two years prior to the commencement of this action.

"Section 5198 of the Revised Statutes of the United States provides for the recovery back of twice the amount of unlawful interest paid if the action therefor be commenced within two years from the time the usurious transaction occurred.

"This action was begun October 7, 1896, and at that time the plaintiff's cause of action was barred and the demurrer for that reason was properly

sustained. There was no error in striking a part of the prayer from the third count of the petition.

"The judgment is affirmed."

The assignments of error assert in various ways plaintiff's claim of rights under sections 5197 and 5198 of the Revised Statutes of the United States.

Mr. Justice McKenna delivered the opinion of the Court.

1. A motion is made to dismiss on the ground that the record presents no Federal question. The motion is overruled. Plaintiff claimed a right under sections 5197 and 5198 of the Revised Statutes, and the decisions of the courts of the State were adverse to such right. (Sec. 709, Revised Statutes.)

2. The demurrer of defendant in error was sustained because the action was not "commenced within two years from the time the usurious transaction occurred." This ruling was indubitably right if *any* date mentioned in the petition be that of the usurious transaction or transactions relied on. The latest date mentioned in the petition is the 31st of May, 1894, when, it is alleged, "J. W. White and the defendant herein (plaintiff in error) . . . took possession of the lands and property described," in the mortgage which Talbot gave to the bank March 4, 1890. The present suit was commenced October 7, 1896, hence not within two years from the 31st of May, 1894, and not within six years from the date of the judgment upon which the property was sold.

But it is contended that the bank fraudulently concealed from the plaintiff that it had charged him with usurious interest, and that, therefore, the period of limitation of the statute did not begin "until the discovery of the wrong." A disputable proposition. Besides, it is not available to the plaintiff. The petition does not disclose when the wrong was discovered. On the face of the petition the action was barred, and against its allegations and the circumstances detailed in it we cannot indulge the supposition that plaintiff's consciousness of the wrong was not aroused until some time within two years before the commencement of this action.

Judgment affirmed.

Mr. Justice Gray took no part in the decision.

True copy.

Test:

Clerk Supreme Court, U. S.